(24,823)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 183.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, APPELLANT,

vs.

WILLIAM F. McKNIGHT, J. SAM ROWLAND, AND GEORGE W. BELLAMY, RAILROAD COMMISSIONERS OF THE STATE OF ARKANSAS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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a Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1914, of said Court, Before the Honorable Elmer B. Adams and the Honorable John E. Carland, Circuit Judges, and the Honorable Charles F. Amidon, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the twenty-ninth day of July, A. D. 1914, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Arkansas, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein George W. Bellamy, et al., are Appellants and the St. Louis, Iron Mountain and Southern Railway Company is Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, is in the words and figures following, to-wit:

1 (*Præcipe for Transcript on Appeal.*)

In the District Court of the United States for the Western Division of the Eastern District of Arkansas.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY
vs.
HOWARD H. GALLUP and WILLIAM J. METCALF and GEORGE W. Bellamy, William F. McKnight, and J. Sam Rowland, Railroad Commissioners of the State of Arkansas.

To the Clerk of said Court:

You are hereby requested, in the preparation of the record on appeal in this case to the United States Circuit Court of Appeals for the Eighth Circuit, to copy only the following documents and records:

The Original Bill of Complaint, filed July 18th, 1908.

The order of Judge Van Devanter granting an interlocutory injunction, dated September 3rd, 1908.

The Answer of the defendants, filed July 25th, 1908.

The order showing the filing of the bond required in said order, dated September 12th, 1908, and the bond so referred to.

The order of Judge Trieber increasing the amount of the bond to Eight Hundred Thousand Dollars ($800,000.00), dated June 23rd, 1909, and the order showing the filing of said bond, dated July 5th, 1909; also the bond for Eight Hundred Thousand Dollars ($800,000.00) so referred to.

The final decree of Judge Trieber, dated May 11th, 1911.

The Mandate of the Supreme Court of the United States, filed herein on July 18th, 1913.

The decree of dismissal entered pursuant to said mandate entered July 18th, 1913.

The order extending the time in which to file claims, dated October 17th, 1913.

The Supplemental Bill filed by the St. Louis, Iron Mountain and Southern Railway Company against the parties named in the caption, dated January 9th, 1914.

2 The motion of William J. Metcalf to dismiss the complaint and the motion to dismiss the complaint and answer of Howard H. Gallup, filed January 10th, 1914.

The Decree entered by the Court for a permanent injunction upon the Supplemental Bill, made January 17th, 1914.

The Opinion of the Court on said decree.

(Signed) ALLYN SMITH,
Solicitor for William J. Metcalf and Howard H. Gallup.

Endorsed: Filed July 2nd, 1914. Sid B. Redding, Clerk, by W. P. Feild, Jr., D. C.

In the District Court of the United States for the Western Division of the Eastern District of Arkansas.

In Chancery.

Be It Remembered, That on the 18th day of July A. D. 1908, came into the office of the Clerk of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, the St. Louis, Iron Mountain and Southern Railway Company, by Moore, Smith and Moore, Esqs., its solicitors, and filed thereon on the Chancery side of said Court, its bill of complaint against Robert P. Allen, John W. Crockett and John H. Hampton, Railroad Commissioners of the State of Arkansas, Henry Leigh and George McLean, which bill of complaint is as follows:

In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

In Chancery.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Complainant,

vs.

ROBERT P. ALLEN, JOHN W. CROCKETT and JOHN E. HAMPTON, Railroad Commissioners of the State of Arkansas; Henry Leigh and George McLean.

To the Honorable the Judges of the Circuit Court of the United States for said District:

Your orator, St. Louis, Iron Mountain and Southern Railway Company, brings its bill of [complain*ant*] against Robert P. Allen, John W. Crockett, and John E. Hampton, as members of and constituting the Railroad Commissioners of the State of Arkansas.

3 First. Your orator is a corporation organized under the laws of the State of Arkansas with its domicile at the City of Little Rock, Pulaski County, in said State.

Second. The said defendants, Robert P. Allen, John W. Crockett and John E. Hampton, are citizens and residents of the State of Arkansas, and constitute the Railroad Commission of said State. Said John W. Crockett and John E. Hampton reside in said District, said Robert P. Allen resides at Van Buren, in Crawford County, in the Western Judicial District of said State. The Act of the Legislature of said State under which said Commission was created, fixes and [establishes] the domicile of the Commission at the City of Little Rock, in the County of Pulaski, in said State and in the Western Division of the Eastern Judicial District thereof; the defendants Henry Leigh and George McLean are citizens of the State of Arkansas and reside at the City of Little Rock, in said District.

Third. Your orator further avers that the Act creating the Railroad Commission heretofore referred to, approved March 11, 1899, entitled, "An Act to provide for the regulation of railroad, freight and passenger tariffs, in this State, to prevent unjust discrimination by extortion in the rates charged for transportation of passengers and freight, and to prohibit railroad companies, corporations and lessees in this State from charging other than just and reasonable rates, and to punish the same, and to prescribe the mode of procedure and rules of evidence in relation thereto, and to appoint commissioners and to prescribe rules for their government, and define their powers and duties in relation to the same," and Acts supplemental to and amendatory thereof, invest in said Railroad Commission the power and impose upon it the duty to make and put into effect reasonable and just rates of freight, express and passenger tariffs, to be observed by all persons and corporations operating any railroad or engaged in transporting persons or property

in said State, and to make just and reasonable rates of freight, express and passenger traffic on connecting railroads operated by different and independent companies or corporations between stations within said State, to be observed by all persons, companies or corporations operating connecting railroads within the State, and if two or more connecting lines of railroad in said State shall fail to agree upon the division of charges arising from transportation of freight, passengers or cars over their lines, said Commission is authorized to make the division and fix the prorata part of such charges to be received by each of said connecting
4 lines. Said Act further provides that in case any person or corporation engaged in operating a railroad in the State shall not do, or permit to be done any act, matter or thing in said Act required to be done, or shall be guilty of the violation of any of the provisions of the Act, such person or corporation shall be held to pay to the persons, firm or corporation thereby injured double the amount of the damage by him sustained, and all costs to be recovered by such person, firm or corporation; and in all actions between private parties and railroad companies brought under said Act, the rates, charges, orders, rules, regulations and classifications prescribed by said Commission prior to the institution of such action shall be held to be reasonable, fair and just and shall not be controverted therein. It is also provided by said Act that if any person or corporation operating a railroad in said State, or any lessee of such person or corporation, shall violate any of the provisions of said Act, or aid or abet therein, or shall violate any tariff of charges as fixed by said Commission, or any rules regarding railroads or express companies as made by said Commission, such person, corporation or lessee shall be liable for a penalty of not less than $500.00 nor more than $3,000.00 for each violation of said Act, in an action brought in the name of the State, and in the County in which such violation shall occur, and the said Commission shall institute such actions as may be necessary for the recovery of the penalties prescribed therein through the prosecuting attorney for the proper District, or through counsel specially employed by said Commission.

And your orator avers that the effect of the aforesaid provisions of said Act is to deny to your orator and all persons and corporations operating railroads in said State of the right to a judicial investigation of the validity and reasonableness of the rates, rules, regulations and classifications prescribed by said Commission, and to deprive your orator and all others in like condition of due process of law, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Fourth. Your orator further alleges that on the 15th day of July, 1904, the predecessors of the defendants, the then acting Railroad Commissioners of said State, assuming to act under [authority] of the aforesaid provisions of the Statute of said State, promulgated Standard Freight Distance Tariff No. 2, prescribing freight rates and charges applicable to classes and commodities between all sta-

tions in said States, on all railroads operated therein sub-
5 ject to Western Classifications as adjusted to traffic in said State. The rates therein prescribed were continued in force, with certain amendments thereof made and promulgated by said Commission from time to time, until June 4th, 1908, when defendants acting in their official capacity, adopted Standard Freight Distance Tariff No. 3, applying on classes and commodities [be*tween*] all railroad stations in said State, subject to Western Classifications as adjusted to traffic therein, cancelling Standard Freight Distance Tariff No. 2, aforesaid, and ordered the same to take effect June 15th, 1908. Said tariff contains many of the rates and regulations that were contained in Standard Freight Distance Tariff No. 2, as aforesaid, and the changes and amendments made therein by said Commission since said Tariff No. 2 was promulgated, and other changes in rates on classes and commodities made in the order of said Commission adopted on June 4th, 1908. A copy of said Standard Freight Distance Tariff No. 3 is herewith filed as Exhibit "A," and made a part hereof.

Fifth. You orator avers that each and all of the charges and rates prescribed in said Tariff No. 3 aforesaid, as well and the preceding Tariff No. 2, applying on classes and commodities as aforesaid, are unreasonable, unjust, oppressive, discriminative, confiscatory and void, both in respect to said order as a whole and in respect to each and every rate, charge, tariff, schedule, classification, rule and regulation separately:

(1) The railroad equipment, property and franchises owned and used by your orator in operating [it-] said road in said State represents an investment of $40,906,572.00, according to the last assessment of said property for taxation by the State of Arkansas, through its State Board of Railroad Assessors, which assessment is now in force. Orator has exercised as great a degree of economy in the use and operation of said property as was compatible with the interest of the public and with safe and efficient service to the public, only employing such officers, agents and employees, and expending such amounts in the maintenance and repair of its roadbed, tracks and stations and new equipment of engines, cars and other appliances necessary to the operation of its road and the maintenance of said property, as was necessary and essential to the due and proper operation of its trains, and to the maintenance of said property with due regard to its preservation, and the safety of the public. That no unreasonable wages or salaries have been, or are now being, paid to any of its officers or employees. But notwithstanding that
6 orator has practiced all reasonable and proper economy in operation and maintenance as aforesaid, it has been unable and will be unable to operate said road at a profit at the rates prescribed in said tariff. On the contrary said rates do not and will not yield a just and reasonable return upon the value of your orator's property used in said service, either in respect to the money invested in said property or the service rendered. And in that behalf your orator alleges that the total earnings from intrastate business in the transportation of freights in the State of Arkansas

during the year 1907 did not exceed the sum of $640,284.17; tha
the expenses of operation solely incident to said business, and th
fixed charges solely incident and chargeable to intrastate transpo
tation of freight was $786,602.14. That the total earnings of sai
property from the transportation of freight wholly within th
State of Arkansas is not and will not be sufficient under the rat
on classes and commodities prescribed as aforesaid as a whole, aft
paying operating expenses, charges for maintenance, taxes and othe
necessary fixed charges appertaining to said business, to yield an
return by way of compensation for the service rendered by you
orator, and the effect of such rates will be to prevent your orato
from receiving any return or profit for the services rendered by
to the public, and will deprive orator of its property without du
process of law, and will deny to it the equal protection of the law

(2) Your orator represents that among the principal [com
modit-es] transported on the lines of said Railroad in the Sta
of Arkansas are coal and coal slack; that the principal, in fact, th
only, coal fields now or heretofore operated in said State are situ
ated in the counties of Pope, Johnson, Franklin, Sebastian an
Logan; that the coal mined in said counties is shipped from th
following stations: That in Johnson County from Spadra, Coal Hil
Clarksville, Cabin Creek; that in Franklin County from Denning
that in Sebastian County from Jenny Lind, Huntington, Burn
Montreal, Hackett, Jensen, Bonanza, Dallas, Denison, Excelsio
Greenwood, Geinther, Harp, Hartford, Hoffman, Hoye, Fidelit
Midland, Patterson, and Prairie Creek; and that from Logan Count
from Knoxville, Piney and Paris.

That under the commodity rates prescribed in the aforesaid tari
the rate on coal for a distance of 110 miles to 120 miles [*in*] $1.0
per ton; 120 to 140 miles, $1.05 per ton; 140 to 160 miles, $1.1
per ton; 160 to 170 miles, $1.25 per ton; 170 to 180 miles, $1.3
per ton; 180 to 190 miles, $1.35 per ton; 190 to 200 miles, $1.4
per ton, 200 to 210 miles, $1.45 per ton; 210 to 220 miles, $1.5
per ton. That the principal market in said State for co
7 and coal slack is Little Rock and points north, south an
east of said City; that the City of Little Rock is 114 mil
from Coal Hill, from 141 to 156 miles from the aforesaid coal st
tions in Sebastian County, and 165 miles from the st
tion of Paris in Logan County, by the lines of said road connecti
said points with said City, and over which the product of said co
mines is shipped to said markets and each of them is routed throu
the City of Little Rock, and the same difference in the length
haul from the stations at which said shipments of coal origina
exist as to all of them. That the coal shipped to points north, sou
and east of said City is there transferred to different lines of roa
and in most cases subject to the joint through rates prescribed
said Commission. That the coal mine situated at Jenny Li
in Sebastian County is on your orator's line of road; other min
situated in said County are on the line of the St. Louis and S
Francisco Railroad and the Midland Valley Railroad which co
nect with the main line of your orator. All of said lines of ra

road connect with your orator's line at the City of Little Rock, either directly or through connecting lines. The mines at Paris in Logan County are on the Arkansas Central Railroad, which connects with your orator's line at Fort Smith. That under the regulations adopted by said Commission in regard to rates on commodities Coal Hill Rates apply from all points in Logan, Franklin and Sebastian Counties, and all points in Johnson County west of Coal Hill to the City of Little Rock and points north, south and east of said City, thus fixing the maximum rate from any of said points to the City of Little Rock at $1.00 per ton. That said rate does not pay the cost, including the terminal service, of hauling said product, and is unreasonable unjust, and confiscatory. That a large part of the coal shipped from the aforesaid stations is transported over connecting lines of railroad, and the rate prescribed as aforesaid applies whether said commodities are shipped over one or more than one railroad, under the regulations adopted by the said commission as aforesaid in connection with joint rates on commodities established by said Board. That the distance by rail from the aforesaid stations to Little Rock is from 143 to 165 miles; that the rate from the City of Little Rock as prescribed by said Commission on the several connecting roads being $1.60 per ton, and yet your orator and its connecting lines are compelled under the aforesaid regulations to transport said products from said stations to all stations on your orator's road on a basis of $1.00 per ton, and it avers that the aforesaid rates are not only confi-catory, but they
8 are discriminative, and do not afford to the said lines, or either of them, a fair, reasonable or just compensation for the service rendered in transporting said products.

(3) Your orator alleges that a large proportion of the entire [ton-age] transported over its lines of railroad originating in Arkansas consists of timber and timber products; that at least ninety per cent of said tonnage is shipped from points in said State to points in other States, and is interstate commerce. Under the universal practice prevailing among shippers and railroad companies on said State, where the timber is situated at a distance from the mills, it is transported by rail and concentrated at milling points for the purpose of being converted into lumber and other products, and takes the prevailing rate under interstate shipments from the point at which the shipment of rough material originated in said State to the destination of the mill product in other States; that said milling privilege in transit does not affect the interstate character of said shipments, but is an incident only in the interstate movement. The practice of all the railroads in the State engaged in the transportation of that commodity was, prior to April 1st, 1907, to collect from the shipper the local rate from the place at which the shipment originated to the milling or concentration point. After the product had been milled and shipped to market the regular interstate rate from the point or origin to the point of destination was applied, allowing the shipper the difference between the local and through rate between stations at which the rough material was received and the point of concentration. All shipments of rough material and the several products thereof, viz:

lumber staves, bolts, spokes, handles, hoops, hubs, boat oars, furniture, etc., took that course. On April 1st, 1907, said Commission, recognizing the aforesaid practice, made an order that the following rates should apply on the shipment of rough lumber, staves, fitches, bolts, and logs, in car loads, between all points in Arkansas, viz: For a Distance of From—

1 to 50 miles, inclusive, 2 cents per cwt.
51 to 100 miles, inclusive, 2½ cents per cwt.
101 to 150 miles, inclusive, 3½ cents per cwt.
151 to 250 miles, inclusive, 5 cents per cwt.
250 miles and over, 8 cents per cwt.

Said rates are made upon condition expressed in said order that the manufactured product shall be re-shipped over the same line bringing in the rough material. Said order further provided that carriers would be allowed to require consignees desiring to
9 avail themselves of the benefit of the said rates to enter into contracts with reference to the re-shipment of the finished product under the rules prescribed by said Commission, and your orator avers that the said order of the Commission was made with the direct intent and purpose of establishing, regulating and fixing interstate rates on such material and commodities, by the device of establishing rates applicable between the point of origin of the rough material and the point of concentration for milling purposes, and intending and requiring that such rates should be applied to all shipments of such material from the point of origin in said State to the point of destination in other States; and orator avers that such order is a direct interference with interstate commerce over which said board has no jurisdiction and is, for that reason, unlawful and void. Orator avers further that the aforesaid rates are unreasonable and oppressive, because they do not afford the carriers any compensation whatever for the service rendered in connection with the transportation of said commodities, and are therefore confiscatory, and take the property of orator and other carriers in said State without compensation, and are in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, prohibiting the taking of property without due process of law and without compensation, and guaranteeing to all persons the equal protection of the laws.

(4) Your orator alleges that cotton is the principal agricultural product of the State of Arkansas; that practically the entire crop raised in the State each year is shipped to markets in other States and foreign markets. That on account of economy in transporting said products it has come to be a universal practice to compress the same in small bales or packages, whereby a large number of bales can be loaded on a car; that it is impracticable to establish and operate plants and machinery for the purpose of compressing cotton except at a few central points in the State, and for that reason all cotton destined to markets outside of said state are shipped in the original bales or packages as prepared at the local ginneries throughout the country and concentrated at points on the lines of railroad where

compresses are operated, for compression. Under the universal practice and the rulings of the Interstate Commerce Commission of the United States all cotton raised in said State and shipped to points in other states and foreign markets is subjected to a process of compression for the purpose aforesaid, the shipper being required in the first instance to pay the local rate to the point of concentration; but upon reshipment to points of destination the through, or
10 interstate, rate is applied to the entire shipment from the point of origin (that is to say, the station from which the same was consigned to the point of concentration), to the point of ultimate destination, the difference in the local rate between the point of origin and the place of concentration being allowed the shipper and adjusted in the charge applied to the interstate shipment. Said privilege of compression in transit does not affect the interstate character of said shipments, but is an incident only in the interstate movement. On September 16th, 1907, said Commission made and promulgated an order prescribing the following rates on uncompressed cotton in bales between stations in said State on the following lines of railroad, viz: Chicago, Rock Island and Pacific Railway and Branches, Kansas City Southern Railway, Louisiana and Arkansas Railway, St. Louis and San Francisco Railroad and Branches, St. Louis Southwestern Railway and Branches, St. Louis, Iron Mountain and Southern Railway, leased, independent and operated lines:

For a distance of 30 miles and under, 10 cents per cwt.
For a distance of 45 miles and over 30 miles, 11 cents per cwt.
For a distance of 50 miles and over 45 miles, 12 cents per cwt.
For a distance of 75 miles and over 50 miles, 14 cents per cwt.
For a distance of 100 miles and over 75 miles, 15 cents per cwt.
For a distance of 125 miles and over 100 miles, 20 cents per cwt.
For a distance of 150 miles and over 125 miles, 30 cents per cwt.
For a distance of over 150 miles, 40 cents per cwt.

And further provided, for the purpose of applying said rate to your orator, that its lines or railway should include the following group and continuous mileage should apply between any two or more roads embraced in said group, viz: Your orator, Arkansas and Louisiana Railroad, Arkansas Central Railroad, Arkansas Midland Railroad, Arkansas Southwestern Railway, Brinkley, Helena and Indian Bay Railroad, El Dorado and Bastrop Railroad, Little Rock and Monroe Railway, Little Rock and Hot Springs Western Railroad,
11 Mississippi River, Hamburg and Western Railway, Pine Bluff and Western Railroad.

Said order further provides that——

"In so far as the jurisdiction of the Commission is involved, the "railroad companies operating in this State may continue in effect "the present rates, rules and regulations in respect to the concentra- "tion of cotton at compress points, or the railroad companies may "make such reasonable modifications of same as they may desire, "provided, that before any such change or modification desired to

" be made by any railroad company become operative, the same " shall be first submitted to and approved by the Commission.

" All rates, rules, and regulations in effect in this respect with ref- " erence to the shipment of cotton, which is not expressly disturbed " or affected by the provisions of his order, shall remain in effect " to the same extent as if this order had not been issued." Referring therein to the [practive] hereinbefore alleged in regard to the concentration and shipment of cotton from said State into other States and to markets in foreign countries.

Orator avers that the movement of cotton as aforesaid, and each and all of the parts thereof, as hereinbefore alleged, have been treated and recognized by the public and by the Interstate Commerce Commission of the United States as interstate commerce, and the direct intent and effect of the aforesaid rules, rates and order made and promulgated by the Railroad Commission of the State of Arkansas in regard to the transportation of cotton is a direct and intentional interference with interstate commerce, both as regards the rates and the regulations in reference to the transportation thereof. Wherefore it avers that the same is unlawful and void. And orator further avers that said rates are so unreasonable, unjust and oppressive as not to afford any profit to the carriers handling the same, and are confiscatory and in violation of the aforesaid provisions of the Fourteenth Amendment to the Constitution of the United States.

(5) Your orator alleges that its main line of railroad extends from St. Louis in Missouri to Texarkana in Arkansas, with branches from Knoble to Helena, Bald Knob to Memphis, Diaz to Crest, Camden to El Dorado; that it likewise owns and operates lines of railroad extending from Little Rock to Greenwood via Forth Smith, Little Rock to Cypress on the Louisiana State Line, from Arkansas City to Warren in Bradley County and from New Latur to
12 Arkla via McGehee. That all of said lines, owned and controlled by your orator as aforesaid, are operated as a unit; that a very large amount of interstate traffic passes over them and each of them between the States in and through which the same are operated and into and through other States with which said lines form connections at their several termini. That the local rates in the several states into and through which said lines pass enter to a very large extent, and have a controlling influence, on the through rates charged on interstate shipments, which are made on a combination, or percentage of the combination, of the intermediate local rates, by adding the local rates within the several states into and through which such shipment passes. Said through rates are thus constructed, and from necessity and under the rulings of the Interstate Commerce Commission of the United States, and the orders of said Railroad Commission of the State of Arkansas, affects and controls rates, on interstate shipments passing from, into and through said State by its effect in reducing interstate rates to the sum of the combination or percentage of the combination of the local rates on such shipments. Orator avers that many of the rates established by said defendants were made with reference to the local rates in adjoining states, and for the purpose of compelling the reduction of through rates on the

basis of local rates in the States into which and through which shipments pass. And your orator avers that many of the rates established by the said Railroad Commission of the State of Arkansas as aforesaid were made with the intention and for the purpose, and each and all of said rates so established as aforesaid, will have the effect of regulating and fixing interstate rates on all such classes and commodities, and is therefore an attempt to regulate interstate rates and affect interstate commerce, and is in violation of the Constitution and Laws of the United States, and an invasion by the defendants of the powers, rights and duties vested exclusively by the Acts of Congress in officials of the United States.

(6) Your orator further alleges that [*is*] is provided by an Act of the Legislature of said State, approved April 8th, 1903, that all persons, companies or corporations operating any railroad in said State that forms a continuous line of railway communication, between points in the State, shall issue through passenger tickets and check baggage through, to and from all points on such continuous line of communication at through rates and fares; that all freight and traffic carried wholly within this State to and from stations on lines of continuous carriage shall be waybilled through at through rates and tolls from points of departure to the point of arrival,
13 without being rebilled at junction points; and in case of car load freights the forwarding carrier shall receive and forward the same in the car or cars in which the freight is tendered, and without breaking bulk of packages; that in all cases where there is by physical connection of railroads a continuous line of railway communication between stations within this State, whether such stations be on railroads operated by one and the same company or corporation, or on railroads operated by different and independent companies or corporations, it shall be the duty of said Commission to make just and reasonable rates of freight, express and passenger traffic to and from such stations, to be observed by all persons, companies and corporations operating any railroad or engaged in transporting persons or property as express or freight in this State. That if any two or more connecting lines of railroad in this State shall fail to agree upon a fair and just division of the charges arising from the transportation of freights, pasesngers or cars over such lines, the Commission shall make the division, and shall fix the pro rata part of such charges to be received by each of said connecting lines.

That said Commission, assuming to act under and by virtue of the authority of the provisions of the aforesaid statute, and by the order adopted by it on June 4th, 1908, as aforesaid, attempted to make and put in force through joint rates for the transportation of shipments of merchandise by classes and commodities over two or more lines of railroad, which are not under the same management or control, by adding to the rates prescribed in the schedules prescribed by said Commission for single line or continuous mileage certain differentials, and by fixing a maximum of through joint rates on classes and commodities to be charged by all railroads on shipments between stations in this State. The differential prescribed on merchandise by classes is as follows:

Less than car loads:

First Class	10¢
Second Class	8¢
Third Class	7¢
Fourth Class	6¢
Fifth Class	5¢

Car Load:

Class A	5¢
Class B and C	4¢
Class D and E	3¢

Provided, that when the sum of the local rates prescribed for local application is less than the through joint rate ascer-
14 tained as aforesaid, such sum of rates shall be used as a joint rate, and further, that the through joint rate shall not in any case exceed the following figures:

Less than car load:

First Class	82¢
Second Class	79¢
Third Class	65¢
Fourth Class	74¢
Fifth Class	37¢

Car Loads:

Class A	41¢
Class B	31¢
Class C	27¢
Class D	23¢
Class E	21¢

The joint rates on commodities on two lines of railroad are determined in the same manner, with the [proviso] that the total through joint rate shall not exceed that charged for a single line haul on such commodities.

The through joint rates for the transportation of merchandise by classes over three or more lines of railroad are determined by adding the charges on the several railroads, or parts of railroads, as prescribed for the respective distances such class merchandise is carried over each line, and deducting from the sum ten per cent, provided that the through joint rates shall in no cases exceed the following:

Less than car load:

First Class	92¢
Second Class	84¢
Third Class	72¢
Fourth Class	52¢
Fifth Class	42¢

Car Loads:

Class A	46¢
Class B	35¢
Class C	31¢
Class D	26¢
Class E	24¢

The joint through rates for the transportation of commodities over three or more lines of railroad are determined in the same manner as in the case of merchandise by classes, provided that said rates shall not exceed the commodity rate for 300 miles plus the differential applied to through commodity rates for two lines
15 of railroad, and shall not be less than the rates applying for seventy-five miles. Orator here refers to sheets 19, 20 and 21 of Exhibit "A" hereto, for a full statement in detail of the through joint rates attempted to be established by and through the aforesaid order of said Commission.

Your orator avers that neither the State of Arkansas nor the defendants, acting as the State Railroad Commission of said State, has the power or authority to make contracts for the joint through rates, or joint through routing, over different and independent lines of railroad, or to compel separate and independent lines of railroad to enter into contracts for joint rating or routing of freight over separate lines of railroad, or to accomplish the same result by prescribing arbitrary rules for the creation and division of through joint rates on separate lines of railroad; and to make and enforce joint rates between your orator and other connecting lines of railroad in said State; that the effect of the aforesaid order is to create and establish traffic arrangements between separate and independent lines of railroads in relation to the transportation of merchandise between points on lines of each of said roads, and to compel said railway companies to enter into contract relations with each other without their consent, although the same may be hurtful to their interests. Orator further alleges that the joint through rates prescribed in said order are insufficient to afford any return whatever for the service rendered by the several railroads engaged in the transportation of through freights; that said order is unjust, oppressive, confiscatory, and its effect is to deprive your orator and all other railroad companies operating in said State of their property without due process of law, and will deprive them of the equal protection of the laws, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Sixth. Your orator further represents that by an Act of the Legislature of the State of Arkansas, approved the 9th day of February, 1907, entitled "An Act to Amend Section 6611 of Kirby's Digest of the Statutes of the State of Arkansas, by Fixing Passenger Rates in this State, and for Other Purposes," it is provided that the maximum sum which any corporation or person operating a line of railroad in this State shall be authorized to charge for carrying each first class passenger over such line within the State shall be fixed at five cents per mile on lines of railroad fifteen miles or less in

length, three cents per mile on lines of railroad over fifteen
16 miles and less than eighty-five miles in length, and two cents per mile on all lines of railroad over eighty-five miles in length; and for carrying children between the ages of five and twelve years in charge of adults, one-half of the rates above named, and for such children as are under the age of five years, that no charge whatever shall be made beyond what is collected from the adults having them in charge. It was further provided that said Act should take effect and be in force sixty days after its passage. Said Act was passed for the purpose of amending, and is an amendment to Section 6611 of Kirby's Digest of the Statutes of said State.

Section 6620 of said Digest provides that if any person, or corporation mentioned in Section 6611 aforesaid shall charge, demand, take or receive from any person or corporation any greater compensation for the transportation of passengers than is therein prescribed, such person or corporation shall forfeit and pay for every such offense a sum not less than $50.00 nor more than $300.00 and costs of suit, including a reasonable attorney's fee to be taxed by the Court, to be recovered in a suit at law in any court of competent jurisdiction. That any officer, agent or employee of any such person or corporation, who shall knowingly and willfully violate the provisions of the statute by charging a greater rate than is therein prescribed shall be liable to the same penalties, to be recovered in the same manner.

That on May 15th, 1907, the defendants, acting as Railroad Commissioners of said State, made and promulgated an order providing that—

"The maximum sum which any corporation, person or associa-
"tion of persons (operating) a line of railroad in this State shall
"be authorized to charge and collect for carrying each passenger
"over such lines within the State is fixed at the following rates:

"On lines of railroad fifteen miles or less in length, 5¢ per mile.

"On lines of railroad fifteen miles in length and not over eighty-
"five miles in length, 3¢ per mile.

"On lines over eighty-five miles in length, 2 cents per mile.

"And for carrying children in charge of an adult, there may be
"charged and collected one-half the above named rates for such of
"said children as may be under the age of twelve years and over
"the age of five years, and for such of said children as may
17 "be under the age of five years no charge whatever shall be
"made beyond what is collected from the adults who shall
"have them in charge."

Prior to the passage of the aforesaid statute and the promulgation of the aforesaid order by the defendants, your orator and all other railroads in said State operating lines over seventy-five miles in length charged three cents per mile for the transportation of adults between stations on its and their lines of railroad. That notwithstanding it at all times operated its trains in said State with as great a degree of economy as was compatible with the comfort of passengers, safe and efficient service to the public, and the maintenance and preservation of its property as hereinbefore

alleged, the gross receipts from carrying passengers within the limits of said State at the rate of three cents per mile aforesaid, after deducting therefrom the cost of conducting such business in the State, including operating expenses and maintenance and fixed charges properly appertaining to said business, were not sufficient to leave any adequate and reasonable profit or return upon the value of the property used in and about said business, or for the service rendered to the public.

Orator alleges that the rate fixed and established by the late Act of the Legislature and by the order of said Commission as now in force in said State has caused a large reduction in the rates theretofore prevailing for the transportation of passengers and excess baggage. That it felt constrained, on account of the large number of actions for double damages to which it would become subject under the provisions of the statutes of said State, and the provisions of said statutes making the rates, charges, orders, rules, regulations and classifications prescribed by said Commission in actions between private parties and railroad companies conclusive, and denying such companies the right to question or investigate the fairness, reasonableness and legality of such rates, charges, orders, rules, regulations and classifications, in such actions as well as the harsh and severe penalties prescribed by the failure and refusal to put in force tariffs of charges and rules regulating railroads prescribed and put in force by said Commissioners, as well as by the penalties specially prescribed for the failure to comply with the provisions of said Act of the Legislature reducing passenger rates as aforesaid, to reduce the rates, in compliance with the provisions of said statutes and the aforesaid order; that said rates have been
18 put in force on its lines of railroad in said State since the aforesaid statute and order took effect, and orator avers that all its earnings from intrastate transportation of freight and passengers in said State during said period have not been sufficient to pay operating expenses and the cost of maintenance and fixed charges properly chargeable to said business, and it has been compelled to operate its passenger and freight trains at a loss of revenue. Your orator alleges that the total earnings from the transportation of passengers between stations in the State of Arkansas during the last half of the year 1907 did not exceed $856,542.20, that the total expense of operation solely incident to said business, including all fixed charges except interest charges, was $878,269.84 for the same time; that said period represents the average passenger earnings throughout the entire year.

Seventh. Your orator alleges that the State of Arkansas contains no large cities and very few commercial centers; that a great deal of the jobbing and wholesale trade of said State is interstate business; that the population is sparse and very small as compared with the mileage of railroads operated in said State; that both freight and passenger business of your orator and of all other railroads operated in said State is light; that the rate of two cents per mile for the carriage of passengers and the freight rates prescribed in the aforesaid orders of the railroad commission of said State are unreasonably

low, and neither your orator, nor, it is informed, any other line of railroad operating in said State is able to earn a reasonable compensation for the services rendered either in the carriage of passengers or freight within said State, after paying the necessary expenses of operating and other necessary expenses *and* incident to the intrastate business of said State. That while the rates of passenger fare as well as freight rates have been reduced by the acts of the legislature of said State, as well as by the orders promulgated by said Commission, the expenses of operating and maintaining the railroads and properties used in connection therewith in said State, *has* been materially increased by reason of the legislation of said State and the rules, regulations and orders of said Commission. That during the session of the legislature of 1907, at which the statute requiring the reduction of one-third in the passenger rates was enacted, many statutes imposing burdens and increasing the expense of operating and maintaining railroads were passed. Among such enactments was a law requiring railroads exceeding fifty miles in length to employ three brakemen on trains consisting of more than twenty-five cars, whereas previous to that time two brakemen had been
19 employed and were sufficient for the efficient management of freight trains; requiring railroads to drain road-beds, to construct foot walks to passenger depots, to equip all locomotives with electric headlights, limiting the hours of service of employees, making railroads liable for injuries caused by fellow servants and absolutely liable for damages caused by fires, and numerous special acts affecting and increasing the expense of operating passenger trains and maintaining depots and station houses. That many of the requirements contained in said acts were not necessary for the safe and efficient operation of trains. That a large amount of expense has been incurred and will be necessary in making and maintaining the changes provided for in said legislation, without any increase in the revenues by reason thereof. The result of all of which legislation has been greatly to increase the cost of conducting the business of your orator and other persons and corporations engaged in like business in said State. And orator alleges that all the earnings of all its lines of railroad within said State on the business transacted by it in the State are not sufficient to pay the expenses of operating [properly] applicable to said business and afford an adequate or reasonable return on the money invested in said property.

Eighth. Your orator alleges that the lines of railroad operated by it were constructed under grants of the State of Arkansas, which conferred the right to collect reasonable rates of toll, and fare for the transportation of freight and passengers over and upon the said railroads, and such as would enable your orator to operate said road profitably. That there grew out of said grants and was necessarily implied therefrom an agreement or contract on the part of the State that your orator should have the right to impose reasonable charges and tolls for the transportation of persons and property.

That the General Assembly of the State of Arkansas, by an Act approved July 23, 1868, passed a general law for the creation and

organization of railroad corporations, for the purpose of owning maintaining and operating railroads in said State, under which Act your orator was incorporated. That said Act among other things provided that—

"The legislature may when any such railroad (meaning any rail-"road organized under the provisions of said Act) shall be open for "use, from time to time alter or reduce rates of toll, fare, freights, "or other profits upon such road; but the same shall not, without "the consent of the corporation, be so reduced as to produce with "said profits less than 15 per cent per annum on the capital "actually paid in, nor unless on an examination of the "amounts received and expended, to be made by the Secre-"tary of State, he shall ascertain that the net income derived by the "Company from all sources for the year then last passed shall ex-"ceed an annual income of 15 per cent upon the capital of the cor-"poration actually paid in."

Said provision of the statute is now in force never having been repealed, and is contained in Kirby's Digest of the Statutes of Arkansas as Section 6590.

Said lines were constructed by your orator and those from who it acquired and under whom it holds the same, on the faith that the State would in good faith carry out and perform its aforesaid agreement in regard to rates to be charged by railroads in said State as aforesaid, as well as with reference to the annual profits, and that it would not by direct legislation, or through any agency created by it, impose on the persons and corporations owning and operating said railroads such rules, regulations and tariffs as would deprive them of the right to establish and charge such rates as should be reasonable, just and fair, and as would enable it to earn a profit of 15 per centum per annum on the capital actually paid in. Your orator alleges that while it has voluntarily reduced its rates from time to time as the development of the business upon its lines and the conditions of the country would warrant, it has never consented to such reduction of its rates by the State as would reduce its profits annually below the rate provided for in the aforesaid statute.

Your orator avers that, disregarding its contract and obligation in the premises, the State of Arkansas by and through the aforesaid Act of the Legislature of said State, approved February 9th, 1907, aforesaid, and the orders of the State Railroad Commission, established rates of passenger fare and freight charges which do not enable your orator to earn 15 per centum per annum on the capital actually paid in, or in fact sufficient to pay the expenses of operating, maintaining, and keeping down the fixed charges pertaining to the business of carrying passengers and freight in said State, or on its entire lines of railroad and business conducted therein. That the action of said State in fixing said unreasonable and confiscatory rates, and in depriving your orator by the aforesaid legislation and acts and orders of said railroad commission, of the power to earn a profit of not less than 15 per centum per annum on its

capital actually paid in, impairs the obligation of the con-
21 tract of the State contained in said statute as hereinbefore
set out, in violation of the provisions of Section 10, of Article 1, of the Constitution of the United States, prohibiting the State from passing any law impairing the obligation of its contract.

Ninth. Your orator represents that by the provisions of the aforesaid acts of the legislature of the State of Arkansas, any railroad failing or refusing to put in force any tariff ordered by said Board of Railroad Commissioners, or any of the rules and regulations prescribed by said Commission, is not only liable to a penalty of not less than $500.00 nor more than $3,000.00 for each violation, but is also made liable to pay to any person, firm or corporation injured by such violation double the amount of damages sustained by him and all costs, and as a cumulative penalty, any railroad that shall charge, take or receive any greater compensation for the transportation of passengers than the rate prescribed by law shall forfeit and pay for every such offense not less than $50.00 nor more than $300.00 and the costs of suit, including a reasonable attorney's fee to be taxed by the Court; and it is further provided that any office-, agent, or employee of any railroad, who shall knowingly and [*willingly*] demand, take or receive a greater compensation for the transportation of passengers than the amount allowed by law, shall likewise forfeit not less than $50.00 nor more than $300.00 and costs of suit, including attorney's fee, to be taxed by the Court, for each offense. Orator alleges that the penalties and liability imposed by the aforesaid provisions of the statutes are so severe as to constrain persons and corporations subject to the provisions of such legislation to submit thereto, however illegal, rather than take the risk of incurring such enormous liability and penalties, the effect of which would be to utterly bankrupt and destroy them, and cause the persons whose money is invested in such property to forfeit their entire investment. That no prudent officer, agent or employee of [*sny*] such railroad company could afford to take the risk of the penalties and forfeitures imposed on him personally by said statutes. Wherefore your orator and all other persons and corporations operating railroads in said State and subject to the provisions of the aforesaid statutes, have been coerced into compliance with the aforesaid illegal and confiscatory legislation by said State and orders made and promulgated by said Railroad Commission, rather than to subject said properties, and the officers, agents and
employees employed in and about the operation of the same
22 to the great multitude of suits and prosecutions that would
have followed the failure or refusal to put said rates in force. But your orator avers that said rates, both as to freight and passenger, cannot be continued in effect without irreparable loss to it, and serious and irreparable injury to and destruction of the property, rights and interests of your orator, and of all persons interested in said property as creditors or stockholders of your orator.

Tenth. Your orator further alleges that the penalties prescribed by the statutes of the State of Arkansas for the violation of the rules and regulations of said Commission, and the rates of freight

and passenger fare put in force by said Commission, are unreasonable and excessive in amount. That the penalties that will accrue against your orator each day for the violation of the rates prescribed by the aforesaid orders of said Commission for the carriage of freight between stations in said State, on the basis of the minimum fine prescribed by law, would amount to $— and for the violation of the rates prescribed as aforesaid for carrying passengers within said State on the basis of the minimum fine [emposed] by the aforesaid statutes would amount to $—. That said penalties are immoderate and out of proportion to the acts designed to be punished; they are absurd and unreasonable in that they apply without discrimination to a great variety of acts and omissions that are wholly unlike and dissimilar both in regard to the nature of the act done or omitted and its effect upon the rights of the public and of individuals, and said provisions are manifestly designed to operate as a menace to compel unquestioning obedience on the part of railroad companies, their officers, agents and employees to all orders, rules and regulations promulgated by said commission without regard to their lawfulness, by exposing such companies to such ruinous fines and penalties, and the officers, agents and employees of said companies likewise to such severe and ruinous penalties as to deter the said companies, and the officers, agents and employees thereof, from resisting on any ground, however harsh or unreasonable the action of said commission may be or seem, and by deterring all said parties from resorting to the courts for the purpose of contesting the legality of such rules, regulations and rates, for fear of being harassed and oppressed by a multitude of prosecutions and suits during the pendency of such proceeding, and of the consequences to them in case they should fail to maintain the ground of contest,

23 nothwithstanding that the same may have been instituted in the utmost good faith and for the purpose of testing and judicially determining the validity and legality of such order, rule or regulation. Wherefore your orator avers that said provisions are descriminative, and deprive your orator, and all others in like condition, of their property without due process of law, and of the equal protection of the law, and are therefore in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Said provisions are likewise in violation of Section 9 of Article II of the Constitution of the State of Arkansas, which provides that no person shall be subject to excessive fines, and that no unusual punishment shall be inflicted.

Eleventh. Your orator further alleges that the defendants, Henry Leigh and George McLean, are shippers on your orator's line of railroad and make frequent shipments of freight between stations situated wholly within said state. Said defendants are also in the habit of travelling on your orator's passenger trains between stations in said state, and it alleges and shows that many thousand other citizens and residents of said state are engaged in business in said state, and are shippers of freight over your orator's line of railroad between stations in said state, and that large numbers of persons

residing in said state are in the habit of travelling on your orator's passenger trains between stations in said state. Orator further alleges that if it shall disregard, violate or refuse to put or keep in force the aforesaid prescribed rates by said commission for the transportation of freight and passengers, or any or either of said rates, or shall violate or fail to carry into effect any of the rates, charges, orders, rules, regulations, and classifications prescribed by said commission on the ground that the same is unjust, unfair, unreasonable, confiscatory, and in violation of the constitution and laws of the United States as hereinbefore alleged, said commission will cause penalty suits to be instituted against it, as authorized by the provisions of the aforesaid statute through the prosecuting attorneys of the various judicial districts in said state through which your orator's lines of railroad [extent;] that a great number of suits at law for the recovery of penalties for the violation of the numerous rates contained in the schedules known as the Commission's Standard Freight Distance Tariff No. 3 will be brought; that said suits will be brought against your orator for the violation of each of the rates for the transportation of passengers as well as freight between many stations on its lines of railroad; that a
24 large number of suits for penalties and double damages will be brought against your orator by the aforesaid defendants who are shippers and patrons of your orator, and others of the same class involving a very large number of suits in many countries in said state; that your orator will be required to produce its books and papers in the defense of each of the numerous cases brought by and under the direction of said commission, and by private shippers and patrons for the purpose of showing that the rates established by said commission are unreasonable, and would be greatly harassed by being compelled to defend such a multitude of suits.

Orator further alleges that the expense involved in the defense of such suits as will be instituted against it in case it refuses to comply with the illegal, unjust and confiscatory rates, rules and regulations of said commission, would be great, and would involve great and serious loss to your orator without regard to the result of such litigation; that under the provisions of the statutes hereinbefore referred to, your orator would be precluded from pleading or proving the unreasonableness of said rates in proceedings instituted by private shippers, and judgments would doubtless be recovered in many of said actions, and orator would be compelled, in order to protect its property from levy and sale thereunder, to file numerous supersedeas bonds, by which it would be put to considerable expense and inconvenience; that the question as to whether the rates prescribed by the commission as aforesaid are unreasonable or not could not be properly determined in suits of this character, and that the loss which would be sustained by your orator in an attempt to defend such suits would be so serious as to be irreparable. Wherefore your orator prays leave to sue the aforesaid defendants as representatives of all of said classes of persons, whether shippers of freight or as pessengers.

Twelfth. Your orator alleges that this cause arises under the Con-

stitution and laws of the United States, and that the matter in dispute and controversy exceeds, exclusive of interest and costs, the sum and value of two thousand dollars.

Premises considered, for as much as your orator is remediless at law and can only obtain relief in a court of equity, where matters of this kind are cognizable, your orator prays:

(1) That the orders of the Railroad Commission of the State of Arkansas, fixing rates and charges for freight transported by your orator within said state, and fixing and establishing joint through freight tariffs on different and independent lines of railroad, and all rules and regulations affecting and concerning the same and each and every part thereof, and each schedule in said orders contained, be set aside and held for naught; that the order of said Commission, made on June 4, 1908, to take effect June 15, 1908, fixing and establishing tariffs and charges on freights transported over your orator's line of railroad between stations situated within said state on classes and commodities, and fixing and establishing joint through rates on independent connecting lines of railroad, and all rules and regulations affecting and concerning the same, and contained in said order of June 4, 1908, be set aside and held for naught.

(2) That said act of the legislature of the State of Arkansas, approved the 9th day of February, 1907, and the orders of the Railroad Commission of said state establishing and fixing a rate of two cents per mile for the transportation of passengers between stations in said state on your orator's railroad and over said lines leased and operated by it in said state, be set aside and held for naught, and that so much of the order made by said commissioners on June 4, 1908, to take effect June 15, 1908, as relates to the aforesaid passenger rates, and fixes and establishes the same on the basis of two cents per mile, be set aside and held for naught.

(3) That the defendants as Railroad Commissioners of the State of Arkansas be restrained and enjoined from putting into force, or taking any step or action whatsoever looking to the putting into force and effect, the aforesaid tariff of charges for the transportation of freight and passengers on your orator's railroad within the State of Arkansas, adopted by it on June 4, 1908, as aforesaid, and that said tariffs, and all rules, regulations and orders made and promulgated by said defendants for the purpose of putting the same into effect, be set aside and held for naught.

(4) That the provisions of the aforesaid statutes of the State of Arkansas prescribing penalties against your orator and others in like condition for the failure or refusal to put into force any tariff ordered by the Railroad Commission of said State, or any of the rules and regulations prescribed by said Commission or for charging, taking or receiving any greater compensation for the transportation of passengers than the rate prescribed by law, be declared void and of no force or effect whatsoever, and that said Commissioners and each and every one of them, their successors in office, agents, servants, and employees, be temporarily and permanently restrained from enforcing, or attempting to enforce, the rates,

charges, rules and regulations fixed by orders of said Com-
26 mission aforesaid respecting the carriage of freight and passengers within the State of Arkansas, or from enforcing or attempting to enforce through any agency provided in the statutes of the State of Arkansas or otherwise, any of the penalties prescribed by the statutes of said State for failure on the part of your orator to observe any of the aforesaid orders made by said Commission; and that said Commissioners be temporarily and permanently enjoined and restrained from prosecuting any suit or action, or causing the same to be prosecuted, by any officer or agent of said Commission or by any officer of the State of Arkansas, or by any other person, for the failure to put or keep in effect and observe the rates of freight and passenger fare and the rules and regulations of said Commission so fixed and established as aforesaid, or from taking any action with the intent and for the purpose of enforcing the provisions of the order made by said Board on May 15, 1907, fixing rates for the carriage of passengers and freight as aforesaid, or from doing or attempting to do, any act or thing, or to require your orator to do any act or thing, by the compliance with, or for the purpose of carrying out, said order, rules and regulations or any part thereof.

(5) That the defendants Henry Leigh and George McLean and all other persons belonging to the same class, including all patrons of your orator's railroad, either in the shipment of freights between stations on your orator's lines of railroad in said State, or as passengers on said lines between stations in said State, be enjoined and restrained during the pendency of this proceeding from instituting any suit or suits, action or actions, against your orator for the recovery of any penalties under and by virtue of the provisions of any of the aforesaid acts of the legislature of the State of Arkansas, or for the recovery of double damages under and by virtue of the provisions of any of the aforesaid acts of the legislature of said State, and upon the final hearing herein that said defendants and all other persons belonging to the class aforesaid and who are engaged or may be engaged in intrastate shipments of freight on or over your orator's lines of railroad, or may become intrastate passengers thereon, be perpetually enjoined and restrained from instituting any such suits or actions against your orator.

And your orator prays for such other and further relief as may seem meet and as it may be entitled to.

And may it please your Honor to grant unto your orator a writ of subpœna of the United States of America issuing out of and under the seal of this Honorable Court, directed to the
27 said R. P. Allen, John W. Crockett and J. E. Hampton, constituting the Railroad Commission of the State of Arkansas, Henry Leigh and George McLean, thereby commanding them and each of them on a day certain therein to be named, under certain penalty, to be and appear before this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises, but not under oath—answer under oath being expressly waived—and to perform and abide by such order, direction

and decree as may be made in the premises. And your orator will ever pray.

(Signed) MOORE, SMITH & MOORE,
Solicitors for Complainant.

STATE OF MISSOURI,
City of St. Louis, ss:

J. M. Johnson, being duly sworn, says: He is Vice President in charge of traffic of the St. Louis, Iron Mountain & Southern Railway Company, he has read the foregoing bill of complaint and knows the contents thereof. He further states that all facts alleged in said bill [*on*] his personal knowledge are true, and such as are stated upon information he believes to be true.

(Signed) J. M. JOHNSON.

Subscribed and sworn to before me this the 14th day of July, 1908.

(Signed) GEORGE C. DONOVAN,
[SEAL.] *Notary Public.*

My Commission Expires the 9th day of November, 1911.

Endorsed: Filed and writ issued July 18, 1908. (Signed) W. P. Feild, Clerk.

(*Record Entry of Filing of Answer.*)

Before Judge Trieber. July 25, 1908.

Come Robert P. Allen, John W. Crockett and John E. Hampton, Railroad Commissioners of the State of Arkansas, by Morris M. Cohn, esq., their solicitors, and file herein their answer.

(*Answer.*)

To the Honorable Judges of the Circuit Court of the United States for said District:

The defendants, Robert P. Allen, John W. Crockett and John E. Hampton, as members of and constituting the Railroad Com-
28 mission of Arkansas, saving and reserving to themselves all manner of objection and exception which they may be entitled to save to the many imperfections and insufficiencies in the bill of complaint, for answer thereto say:

(1) That the defendants, Robert P. Allen, John W. Crockett and John E. Hampton, admit that they are members of and constitute the Railroad Commission of Arkansas.

Answering the first paragraph of the bill of complaint, they say that it is true that the complainant is a corporation organized under the laws of the State of Arkansas, with its domicile at the City of Little Rock, Pulaski County in said State.

(2) Answering the third paragraph of the bill of complaint, they say that it is true that they reside in the Districts therein mentioned, and that the Legislature of the State of Arkansas has fixed and [extablished] the domicile of said Railroad Commission at the City of Little Rock in the County of Pulaski in said State; and the defendants, Henry Leigh and George McLean, therein mentioned, are citizens of the State of Arkansas, and reside in the City of Little Rock in said District.

(3) Further answering the bill of complaint the defendants say that, as shown by the report of the complainant filed in the office of said Railroad Commission pursuant to the Laws of the State of Arkansas, the St. Louis, Iron Mountain and Southern Railway Company was organized under a special Act of the Legislature of the State of Missouri, approved March 3, 1851; that amendments by special Acts of the Legislature of the said State were made to the said Acts of incorporation on February 17th, 1853 and March 3rd, 1857. By special Act of the Legislature of Kentucky, approved January 16th, 1871, the St. Louis, Iron Mountain and Southern Railway Company was authorized to extend its railroad to the City of Columbus in said State. That subsequently, on July 21st, 1867, by authority of a general Act of the Legislature of the State of Missouri, approved March 20th, 1866, Thomas Allen and associates entered into Articles of Association for the reorganization of said railroad under the name of the St. Louis and Iron Mountain Railroad Company, and said Articles were filed in the office of the Secretary of State of the State of Missouri on July 29th, 1867. That subsequently, on March 17th, 1868, the Legislature of the said State of Missouri authorized the construction of the Arkansas Branch of the St. Louis and Iron Mountain Railroad. That the Cairo and Fulton Railroad Company of Missouri, was organized under
29 the general railroad law of the State of Missouri by Articles of Association September 12th, 1853. That said railroad was afterwards sold under foreclosure proceedings. That on April 23rd, 1872, Thomas Allen and associates reorganized this railroad under the name of the Cairo, Arkansas and Texas Railroad Company, and filed Articles of Association in the office of the Secretary of State of the State of Missouri May 21st, 1872. That by Articles of Association dated March 11th, 1874, which were filed in the office of the Secretary of State of the State of Missouri April 30th, 1874, the Cairo, Arkansas and Texas Railroad Company and the St. Louis and Iron Mountain Railroad Company were consolidated under the name of the St. Louis and Iron Mountain Railroad Company.

That the Cairo and Fulton Railroad Company, of Arkansas, was organized under an Act of the Legislature of the State of Arkansas, approved January 12th, 1853; that the consolidated St. Louis and Iron Mountain and Southern Railroad Company and the Cairo and Fulton Railroad Company, of Arkansas, were consolidated under the laws of the State of Missouri and Arkansas by Articles of Association bearing date March 1st, 1874, and filed in the office of the Secretary of State of the States of Missouri and Arkansas respectively on May 16th and June 2nd, 1874, the corporate name of said consolidated

railroad company being the St. Louis, Iron Mountain and Southern Railway Company; that subsequently the said St. Louis, Iron Mountain and Southern Railway Company became merged with a number of other railroad companies and railroads in the said State of Missouri and the said State of Arkansas; that on February 1st, 1887, Jay Gould, who had previously purchased the Little Rock, Mississippi River and Texas Railway at foreclosure sale, executed a deed of conveyance thereof to the said St. Louis, Iron Mountain and Southern Railway Company, the said Little Rock, Mississippi River and Texas Railway Company having been formed by the reorganization of the Little Rock, Pine Bluff and New Orleans Railroad Company and by purchase of the road and franchises of the Mississippi, Ouachita and Red River Railroad Company; that the said complainant reported to the said Railroad Commission that the said Little Rock, Mississippi River and Texas Railway Company had been consolidated by purchase with the said St. Louis, Iron Mountain and Southern Railway Company under the railroad law of the State of Arkansas as contained in Mansfield's Digest of 1884, and particularly Section 5516 and following sections.

That the said complainant also reported that by deed dated December 13th, 1893, a conveyance was made to it [*if*] the
30 railroad, property and franchises owned by the Houston, Central Arkansas and Northern Railway Company, (a corporation organized under the general railroad law [*od*] the State of Arkansas June 1st, 1890), the constructed road so acquired extending from McGehee Junction in the County of Desah, State of Arkansas, in a southwesterly direction through the counties of Desah, Chicot, Drew and Ashley in the State of Arkansas and beyond.

A conveyance to the St. Louis, Iron Mountain and Southern Railway Company was also reported by the said complainant as aforesaid to have been made to it by deed dated April 13th, 1906, of the railroad, property and franchises of the Little Rock and Fort Smith Railway, a railway running from Argenta, Arkansas, to Fort Smith, Arkansas, through the said State of Arkansas. And, in the said report, the said complainant stated that consolidation of the said Little Rock and Fort Smith Railroad Company had been had under the provisions of said Mansfield's Digest of the laws of the State of Arkansas, and particularly said Section 5516 and following sections.

(4) Answering paragraph marked 3rd in the complaint, the defendants say that it is true that the said Railroad Commission was created by the Act of March 11th, 1899, as set forth in said paragraph, but that said paragraph has omitted to state that suit is for damages and costs sustained by any person, firm or corporation under the provisions of the act referred to had to be instituted within a year from the accrual of the right, or same became barred.

But the defendants deny that the effect of the provisions of said Act of March 11th, 1899, was to deny to the complainant and to all other persons and corporations operating railroads in said State the right to a judicial investigation of the validity and reasonableness of the rates, rules, regulations and classifications prescribed by said Commission; or that it deprived the complainant and all others in

like condition due process of law, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States. For, they say that by the terms of Sections 6813 and 6814 of Kirby's Digest of the Laws of the State of Arkansas, as construed by the Supreme Court of Arkansas, the rates, rules, regulations and classifications referred to have only prima facie effect, and they aver that this did not amount to a deprivation of due process of law within the meaning of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

31 (5) Answering paragraph marked 4th, of the complaint, defendants say that it is true that Standard Freight Distance Tariff No. 3 was adopted in lieu of all [preceeding] tariffs on June 15th, 1908, but they aver that said Standard Freight Distance Tariff No. 3 was substantially similar to Standard Freight Distance Tariff No. 2, adopted by the Railroad Commission on the 15th day of July, 1904; and they also aver that the Standard Freight Distance Tariff No. 2, was a repetition in substance of the First Standard Freight Distance Tariff adopted by the said Railroad Commission on April 10th, 1900. Defendants say at different times during the history of said Railroad Commission technical questions were raised as to whether certain items were faithfully adjusted, and it was necessary to dispose of such matters by rulings or construction. This being found unsatisfactory, when Standard Freight Distance Tariff No. 3 was issued, the said Railroad Commission gave notice that it would take up, at the meeting of June 4th, 1908, the question of adopting it as a whole. It was formally adopted and thus disposed of any inadvertent discrepancies which had crept into the compilations previuosly. And the defendants aver that there is no substantial difference between the freight rates adopted by the said Standard Freight Distance Tariff No. 3 and those first put into effect on April 10th, 1900.

(6) Defendants answering the paragraph marked 5th of the bill of complaint, deny that the charges and rates prescribed in the said Standard Freight Distance Tariff No. 3, as well as the preceeding Tariff No. 2, applying on commodities and classes, or otherwise, were, or are, in any respect unreasonable, unjust, oppressive, discriminatory, confiscatory or void, either in respect to said order as a whole, or in respect to each and every rate, charge, tariff, schedule, classification, rule or regulation separately considered. And they say that they don't know how much the railroad equipment, property and franchises, owned and used by the complainant in operating its said road in said State, represents, but they deny that the sum of $21,353,210.00 correctly represents the said investment. They deny that complainant has exercised as great a degree of economy in the use and operation of said property as was compatible with the interests of the public and with the safe and efficient service to the public, or, that it only employed such officers, agents or employees, or expended only such amounts in the maintenance and repair of its roadbed, tracks, and stations, or for new equipment of engines, cars or other appliances necessary to the operation of its road and the maintenance of said property, as was necessary and essential to a due and proper operation of its trains, or to the

maintenance of said property with due regard to its preserva-
32 tion and the safety of the public.

They deny that no unreasonable salaries or wages have been or are now being paid to any of its officers and employees. They deny that complainant has practiced all reasonable and proper economy in the operation and maintenance of its railroad, and they deny that the operation of said road, if preperly and economically conducted, would not yield a profit exceed- fifteen per centum at the rates prescribed in said tariff. They deny that said rates do not and will not yield a just and reasonable return upon the value of complainant's property used in said service, whether in respect to the money invested in said property, or the service rendered. They deny that the total earnings of the complainant from its intrastate business in the transportation of freight in the State of Arkansas during the year 1907 did not exceed the sum of $640,284.17. They aver that the condition of the affairs in the United States in the year 1907, financially and commercially, should form no criterion for other years because they say that conditions were very much depressed in the concluding and busy months of said year by reason of a panic which stopped a great many industries and curtailed business of all kinds, including transportation by railroad. They deny that the expense of operation solely incident to intrastate business, and the fixed charges solely incident and chargeable to the intrastate transportation of freight was $784,602.14. They deny that the total earnings of the complainant's property from the transportation of freight wholly within the State of Arkansas is not and will not be sufficient, under the rates on classes and commodities prescribed in said tariff, to pay operating expenses, charges for maintenance, taxes and other necessary fixed charges appertaining to said business and yield any returns by way of compensation for the service rendered by complainant. And they deny that the effect of such rates is and will be to prevent complainant from receiving any returns or profit for the service rendered by it to the public, or will deprive it of its property without due process of law, or will deny it the equal protection of the laws.

(7) Defendants, answering the second part of paragraph marked 5th of the complaint, admits that coal fields are situated as stated therein, and that coal mined in said counties is shipped from the stations mentioned therein, and that commodity rates on coal are as stated therein, and they deny that said rates, either as a whole or otherwise, do not pay the cost of service, including the terminal service, or, are in any respect unreasonable, unjust or con-
33 fiscatory. They admit that some of the coal shipped from the aforesaid stations is transported over connecting lines of railroad, but they deny that a large part is. They say on information and belief that a very small part of said coal was transported over connecting lines of railroad. And they further aver that if the rates prescribed applied, whether said commodity was shipped over one or more than one railroad under the regulations adopted by them, there was nothing unusual or unjust about it; that such rates were fair and remunerative, and that complainant never heretofore complained to the Commission by any specific method of

complaint wherein it set forth that the rates were confiscatory, or asked the said Railroad Commission to increase said rates, whether applicable to hauls that required the services of more than one carrier, or otherwise. They deny the allegations in said part of said complain- that any one of said rates was discriminatory, or did not afford to the said lines, or either of *the* them, a fair, reasonable and just compensation for the service rendered in transporting said product.

(8) Answering that part numbered 3rd of said paragraph marked 5th, defendants say that they do not know how a large proportion of the entire tonnage transported over complainant's lines of railway originating in Arkansas consists of timber and timber products, but they deny that at least ninety per centum of said tonnage was shipped from points in said State to points in other States, or was interstate commerce. They are advised that it is not material for them to reply to that part of the said complaint which states the custom prevailing between shippers and the railroad companies in the State of concentrating rough lumber at milling points. But they deny that on April 1st, 1907, or at any other time, they recognized the said practice and for the purpose of regulating the same made an order that the following rates should apply on the shipment of rough lumber, staves, flitches, bolts, and logs in carloads between all points in Arkansas set forth in said complaint. They admit that said rates were made upon the condition expressed in the order that the manufactured product should be reshipped over the same line bringing in the rough material, but they deny that such shipment contemplated an interstate shipment or a shipment beyond the limits of the State or that it was an attempt in any manner to control shipments beyond the State. They deny that at the time any rate established by them was published or had the effect of operating as a rate applicable to interstate commerce. And they deny that any order made by them in relation to the
34 rate of transportation for lumber in the rough or otherwise was made with the intent and purpose of establishing, regulating or fixing rates on such material or commodities by any devise, though they admit the rates established from the point of origin of rough material to the point of concentration for milling purposes was based upon the custom of railroad companies to recognize the somewhat cheaper rates from the point of origin to the place of concentration, in consideration of their obtaining the whole haul. But the defendants deny that there is any universal practice prevailing among shippers and railroad companies in said State, where the timber is situated at a distance from the mills, to have it transported by rail and concentrated at milling points for the purpose of being converted into lumber and other products, and take the prevailing rate under interstate shipments from the point at which the shipment of rough material originated in said State to the destination of the milled product in other States. They deny that there is any milling privilege in transit recognized or countenanced by them, which is an incident to interstate movement, or affects the interstate character of shipments of lumber. They deny that the aforesaid

rates are unreasonable or oppressive, or that they do not afford the carrier any compensation whatever for the service rendered in connection with the transportation of said commodities, or are confiscatory, or take the property of the complainant or other carriers in said State without compensation, or are in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States prohibiting the taking of property without due process of law and without compensation, or denying to any persons the equal protection of the law.

(9) Answering the part numbered 4th of the paragraph marked 5th in the complaint, defendants say that the rates set out therein are correctly stated, but that the rates are flat or local and have no reference to any interstate shipment whatever; that the said defendants, as such Railroad Commission, has not at any time adopted any custom of concentrating cotton at compression points for the purpose of having the same compressed and transported outside the State of Arkansas; that they have not made any regulation in reference to any such custom, but have confined themselves to making flat rates for delivery of cotton at points in the said State of Arkansas. They are advised that it is not necessary for them to answer that part of said complaint that describes the manner in which cotton is concentrated at compression points. And they deny that the order, copied by the complainant in said part of its
35 complaint, in any way attempts to regulate interstate commerce; that no attempt was made by the said Railroad Commission, by anything recited in the said order, nor has it ever taken any action which could be construed as intending to affect the transportation of cotton from a point in the State of Arkansas to a point without the State of Arkansas which, during the transportation, was unloaded at a compress and put into compressed form instead of an uncompressed form. And they deny that the flat rates so made in any manner conflicted with the jurisdiction of the Interstate Commerce Commission of the United States, or with the movement of cotton, or any part thereof, which has been treated and recognized by the Interstate Commerce Commission as interstate commerce. They deny that there was any direct or intentional interference with interstate commerce, either as regards the rates or regulations in [refer-nce] to the transportation of said cotton. They deny therefore, that the said rates were unlawful and void, and they also deny that they were unreasonable, unjust or oppressive, or did not afford any profit to the carriers handling the same, or are confiscatory, or are in violation of the aforesaid provisions of the Fourteenth Amendment to the Constitution of the United States.

(10) Answering that part of paragraph marked 5th. which is numbered 5th. defendants admit that the complainant owns and controls the lines of railroad mentioned in said part of its complaint, but they deny that the said roads are operated as a unit. They admit that a very large amount of interstate traffic passes over the said roads and each of them. They deny that the local rates in the several States in which and through which said lines pass enter to a very large extent and have a controlling influence on the through

rates charged on interstate commerce. They aver that all local rates established by said Railroad Commission are within the province of said Commission, and have reference solely to intrastate commerce; that the said Railroad Commission of the said State of Arkansas has nothing to do with the through rates applying on interstate commerce on the lines of the said complainant or any other railroad company. They deny that the matters alleged in said part of said complaint, as far as they seek to show that the local rates made by the defendants enter into through rates made by the complainant in interstate traffic, are material. They deny that, by reason of any of the matters set forth in said part of said complaint, the rates established by said Railroad Commission were made with the intention and for the purpose, or that each and all of said rates
36 so established will have the effect of regulating and fixing rates on all classes and commidities, or that the same amount to an attempt to regulate interstate rates or affect interstate commerce, or are in violation of the Constitution of the United States or are an invasion by the defendants of the powers, rights or duties vested exclusively by the Acts of Congress in officials of the United States.

(11) Answering that part of paragraph 5th which is numbered 6, defendants say that by the Act of April 8th, 1903, passed by the General Assembly of the State of Arkansas, the said Railroad Commission was invested with power to establish joint rates and to provide for continuous carriage; that they do not know whether the terms of said Act are correctly copied in the said part of the said complaint or not. They admit that they have assumed to act under the terms of said act, and that they have put in force joint rates and that the rates are correctly stated in said part of said complaint. They aver that prior to the enactment of the said Act of the Legislature, the said Commission did not have the power to deal with continuous transportation and joint rates, and that the said Act was passed for the purpose of enabling the said Commission to deal with the matter, which was necessary to the protection of the shippers of the State of Arkansas; that prior to the enactment of the said Act, there were great evils growing out of the practice of the railroad companies in said State, including that of the complainant whereby a haul that was really continuous was split up into fragments over the different lines which were formally described as independent lines, though all under one management, and different local rates over each of the lines was applied, to the great damage of numerous shippers in said State; that it was deemed to be just and proper by the Legislature of the State of Arkansas to correct this practice by passing and to provide a method of joint rates and joint routes that should be just to the railroads of the State as well as to the shippers. So the said act was passed by the Legislature of the State of Arkansas at the time stated. That the rates so established by the defendants were established after a careful inquiry and proper hearing of the railroad companies and other parties concerned; that the said complainant has never filed any petition before the Railroad Commission complaining of the said joint rates

established, or any other orders relating to joint traffic established by the said Railroad Commission. They say, as they are advised, that the said law was within the proper province of the Legislature of the said State of Arkansas, and they deny that the said
37 joint rates are insufficient to afford any return whatever for the service rendered by the several railroads engaged in the transportation of through freight, or that said order is unjust, oppressive or confiscatory, or that its effect would be to deprive complainant or any other railroad company operating in said State of their property without due process of law, or will deprive them of the equal protection of the laws, in violation of any provisions of the Fourteenth Amendment to the Constitution of the United States.

(12) Answering paragraph marked 6th, defendants admit the passage of the Act of February 9th, 1907, referred to in said paragraph, and admit the provisions of Section 6620 of Kirby's Digest of the Laws of the State of Arkansas. They admit that the said Railroad Commission on May 15th, 1907, made the order mentioned in the said paragraph, but they deny that there was any necessity for the order, or that it worked any damage or detriment to the said complainant. They say, upon information and belief, that the railroad companies were in the habit of charging three cents a mile on lines of seventy-five miles in length prior to the enactment of said law, but they deny that the said three cents per mile, after deducting therefrom the costs of conducting said business in said State, the actual operating expenses and maintenance and fixed charges principally appertaining to the said business, were not sufficient to yield adequate and reasonable profit or returns upon the value of the property used in and about said business, or for the service rendered to the public.

They aver that the traffic in the said State of Arkansas, as they are informed and believe, by reason of the reduction in the rate from three to two cents, has increased to such an extent that the said complainant was not in any manner injured thereby, and that it yielded a large enough revenue to leave a considerable profit to the said complainant, unless it was unreasonable and [extravigant] in the management and operation of its road, or demanded profits upon fictitious values. Defendants deny that the complainant felt constrained to abide by the provisions of the statutes of the said State of Arkansas by reason of any of the matters alleged by it in said part of its complaint.

They deny that any statutes of said State made any rates, charges, orders, rules, regulations or classifications prescribed by said Commission in actions between private parties and railroad com-
38 panies conclusive. They deny that such companies were denied the right by any statute of the State of Arkansas to question or investigate the fairness or reasonableness or legality of any rates, charges, orders, rules, regulations or classifications. They deny that there were any harsh or severe penalties prescribed for any failure or refusal to put in force tariffs or charges or rules regulating railroads prescribed and put in force by said commission. They deny that there was anything unusual about the penalties

prescribed for the failure to comply with the provisions of the act reducing passenger fares. They admit that said two cent rate has been in force on complainant's lines of railroad in said State since the aforesaid statute and order took effect, and they say that the said complainant never heretofore made any complaint on account thereof. And they deny that the earnings from intrastate transportation of freight and passengers in said State during any period have not been sufficient to pay operating expenses and the cost of maintenance and fixed charges properly chargeable to said business, or that it has been compelled to operate its freight and passenger trains at a lose of revenue. They deny that the total earnings for the transportation of passengers between stations in the State of Arkansas during the last half of the year 1907 did not exceed $836,542.20, or that the total expense of operation solely incident to said business, including all fixed charges except interest charges, was $878,269.84 for the same period, or that said period represents the average earnings through the entire year. They aver that during the latter part of the year 1907 a monetary and commercial panic prostrated all industries in the United States, including the State of Arkansas, and that by reason of this fact the business of transporting passengers and freight was very much reduced on all the lines of railroad throughout the United States and in the State of Arkansas, and that by reason of this fact the earnings from that source in the said part of the year 1907 could not be taken as a criterion.

(13) Answering the paragraph of the complaint marked 7th, said defendants say that they are unable to understand what is meant by the allegation that the State of Arkansas contains no large cities and very few commercial centers. They admit that a great deal of the jobbing and wholesale trade of said State is interstate business, and they say that the interstate feature of the business is for the most part confined to shipments from the eastern sea-board, from the north and from the south, to the wholesale jobbers of the State. They deny that the population is sparse
39 and very small as compared with the mileage of railroads operating in said State, or that either the freight or passenger business of complainant and of all other railroads operating in said state is light, or that the rate of two cents per mile for the carriage of passengers and the freight rates prescribed in any orders of the Railroad Commission of said State are unreasonably low. They deny that neither complainant nor any other lines of railroad operated in said State is able to earn a reasonable compensation for the service rendered in the carriage of passengers or freight within said State, after paying the necessary expenses of operating and other expenses necessary and incident to the intrastate business in said State.

They deny that the expense of operating and maintaining the railroads and properties of the complainant in said State has been materially increased by reason of the legislation of said State or the rules, regulations or orders of the said Railroad Commission. They deny that during the session of the legislature, at which the statute

requiring the reduction of one-third in the passenger rate was enacted, many statutes imposing burdens and increasing the expense of operating and maintaining the railroads were passed, and they say that [whetever] laws were passed were rendered necessary by evils and necessities which grew up with the increased population in the said State, and in the indifference of the complainant and other railroad companies for the lives [if break-man]. They deny that many of the requirements contained in the said acts were not necessary for the safe and efficient operation of trains, or that a large amount of expense has been incurred or will be necessary in making and maintaining the changes provided for in such legislation without any increase in the revenues by reason thereof. They deny that the said legislation, as construed by the Supreme Court of the said State, will greatly increase the cost of conducting the business of complainant or other persons or corporations engaged in like business in said State. They deny that all of the earnings of all its lines of railroad within said State on the business transacted by it in the State are not sufficient to pay the expense of operating principally applicable to said business, or that they do not afford any adequate or reasonable return on the money invested in the said property.

(14) Answering the paragraph marked 8th of the complaint, they admit that the lines of railroad operated by complainant were constructed under grants of the State of Arkansas, but they deny that the said complainant had any other right to collect tolls than was implied in the organization of said railroad company. They admit that the said complainant was entitled to a fair return upon the fair value of its investment over and above the expenses of operating and maintaining it, but they deny that the complainant can include in the yearly expense of operation and maintenance expenditures made for permanent improvements or those matters that are in the nature of permanent improvements. They deny that there grew out of said grants, and was necessarily implied therefrom, any other agreement or contract than has just been stated. They admit that the General Assembly of the State of Arkansas on July 23rd, 1868, passed a general law for the creation and organization of railroad [corporations], and that the section which is still written in Kirby's Digest of the Statutes of Arkansas, and known as Section 6590, was contained therein. But they allege that at the time the said act was passed, there was a provision in the then-existing Constitution of the State of Arkansas, Art. V, Sec. 48, Constitution of 1868 of said State, which provided:

"That the General Assembly shall pass no special act conferring "corporate powers. Corporations may be formed under general "laws; but all such laws may, from time to time, be altered or re-"pealed"

said Section applying to railroad corporations. But subsequently, to-wit: on the 30th of October, 1874, a new Constitution was adopted, by Art. XII, Sec. 6, of which it was provided:

"That corporations may be formed under general laws, which "laws may, from time to time, be altered or repealed. The General

"Assembly shall have the power to alter, revoke or annul any "charter of incorporation now existing and revocable at the adoption "of this Constitution, or any that may hereafter be created, when- "ever, in their opinion, it may be injurious to the citizens of this "State, in such manner, however, that no injustice shall be done to "the incorporators."

That whatever rights accrued to any railroad company organized under either of said Acts were taken subject to the right of the General Assembly of the State of Arkansas to alter or repeal the same; and that subsequently, by the provisions of the Act of March 11, 1899, and acts supplementary thereto, of the General As-
41 sembly of the State of Arkansas, the Railroad Commission was invested with the power to fix the reasonable rates for all railroad companies, and that it adopted the rates which have been heretofore mentioned, pursuant to the authority vested in said Commission by the Acts of the General Assembly aforesaid. And these defendants deny that the said Section 6590 of Kirby's Digest is in force and effect. They deny that the complainant's lines of railroad, or any of those which it acquired and under whom it holds, were constructed on the faith that the State would in good faith carry out and perform any agreement in regard to the rates to be charged by railroads in said State, either with reference to annual profits or otherwise. They deny that upon the pretended faith of said provisions of Kirby's Digest, or any other provisions of the laws of the State of Arkansas, the General Assembly agreed with the complainant or otherwise that it would not, by direct legislation or through any agency created by it, impose on the persons and corporations owning and operating railroads rules, regulations or tariffs as would deprive them of a profit of fifteen per centum per annum on the capital actually paid in. They aver, however, as they are informed and believe, that the said complainant is earning a profit of fifteen per centum per annum, if not more, on the capital actually paid in. They deny that complainant has voluntarily reduced its rates from time to time as the development of the business of the lines and the condition of the country would warrant and demand; they say that when the rates were made which it now complains of, it made no complaint thereof to the Railroad Commission of Arkansas in order to have the matter inquired of and corrected, if any complaint it had which they deny. They deny that the complainant is not able to earn fifteen per centum per annum on the capital actually paid in by reason of the Act of February 9th, 1907, or any orders of the Railroad Commission of said State. They deny that the income is not sufficient to pay the expense of operating and maintaining and keeping down the fixed charges pertaining to the business of carrying passengers and freight in said State. They deny that the action of said State in fixing said rates was unreasonable and confiscatory, or that it deprived the complainant by any legislation or acts, or orders of the said Railroad Commission of the power to earn a profit of not less than fifteen per centum per annum on capital paid in. They deny that there was any impairment of any obligation of any con-

tract which the State entered into with said complainant in conflict with any provision of the Constitution of the United States.

(15) For answer to the paragraph marked 9th of the complaint, said defendants say that no penalty imposed by any provi-
42 sion of any legislation of the Legislature of the State of Arkansas applies except where the act of wrongdoing is done by the complainant. And they aver that the occasions on which the provisions of said statutes of the State of Arkansas were disregarded by the said complainant, and the occasions when its action was oppressive and harmful to the shippers and other persons in the said State of Arkansas, were so numerous and repeated and became so intolerable and unbearable that the General Assembly found it necessary to attach penalties of greater or lesser size to enactments and requirements of the laws of said State in order to obtain an observation thereof by the said complainant and other railroad companies in said State of Arkansas; and that if the said complainant and other railroad companies had shown a disposition to act fairly with the shippers and other persons in the State of Arkansas, such enactments would not have been passed; that there is no way that they know, nor of which they have been advised, by which a railroad company can be induced to carry out its obligations except by the infliction of penalties, and that if sometimes these penalties are severe, it is because, in the wisdom of the Legislature of the State, a smaller penalty would be disregarded. They deny that the penalties and the liabilities imposed by any provision of any statute are so severe as to constrain persons and corporations subject to the provisions of said legislation to submit thereto, however illegal, rather than take the risk of incurring such pretended enormous liabilities and penalties. They deny that the effect of these would be to utterly bankrupt and destroy said complainant or any other railroad company, or cause the persons whose money is invested in such property to forfeit their entire investment. They say that the complainant has not hesitated to disregard the law whenever it saw fit to do so and contest its rights before the Courts of the State of Arkansas, and whenever it was in the right the Courts of Arkansas have protected its rights, as disclosed by decisions under the statutes enacted by the last General Assembly of the State of Arkansas. They deny that no private officer, agent or employee of any such railroad company could afford to take the risk of the penalties and forfeitures imposed upon him personally by said statutes. They deny that the complainant and all other persons and corporations operating railroads in said State subject to the provisions of the aforesaid statutes have been coerced into compliance with any illegal or confiscatory legislation by said State or orders made or promulgated by said Railroad Commission, rather than to subject said property, or the officers, agents and employees employed
43 in and about the operation of the same, to a great multitude of suits or prosecutions that would have followed the failure or refusal to put such rates in force. And they deny that the said rates, both as to freight and passengers, cannot be continued in effect without irreparable loss to the complainant or serious or irreparable injury to and destruction of the property, rights and interests of the com-

plainant, and of all persons interested in said properties as creditors or stockholders.

(16) And for answer to the paragraph marked 10th of the complaint, said defendants say that is is not true that the penalties prescribed by the statutes of the State of Arkansas for the violation of the rules and regulations of said Commission, and the rate of freight and passenger fares put in force by the Commission are unreasonable and execessive in amount. They aver that they have been advised that it is not a ground for complaint against the laws of the State of Arkansas that a party has been a frequent and persistent offender, and because of this fact the penalties he may have incurred may aggregate a considerable sum. And they have been advised and aver that if accummulated penalties are incurred on any account by an offender of the said laws, it is due to the disposition of the persons to frequently offend. And they have also been advised and aver that it is not an excuse to an offender that he has a constitutional disposition to disregard the law and commit offenses prohibited by the laws of the State under which he exists and does business. They deny that the said penalties were immoderate or out of proportion of the acts designed to be punished. They deny that they are absurd or unreasonable in that they apply without discrimination to a great variety of acts that are wholly unlike and dissimilar, both in regard to the nature of the act done or omitted, and in the effect thereof upon the rights of the public and individuals. They deny that any provisions of the statutes are designed to operate as a menace to compel unquestioning obedience on the part of the railroad companies, their officers, agents, and employees, to all rules, orders and regulations promulgated by said Commission without regard to their lawfulness, by exposing said companies to such ruinous fines and penalties, and the officers, agents and employees of said companies likewise to such severe and ruinous penalties as to deter said companies and the officers, agents and employees thereof, from resisting on any ground, however harsh and unreasonable, the action of said Commission may be or seem, or for the purpose of deterring any parties from
44 resorting to the Courts for the purpose of testing the legality of and rules, regulations and rates for fear of being harassed and oppressed by a multitude of prosecutions and suits during the pendency of such proceedings, or because of the consequence to them in case they should fail to maintain the ground of contest. And they deny that any of said provisions were discriminative or deprived complainant, and all others in like condition, of their property without due process of law or the equal protection of the law, or imposed unreasonable fines or unusual punishment, within the meaning of the Constitution of the United States or of the State of Arkansas.

(17) For answer to the said paragraph marked 9th and 10th of the complaint, and also of some of the [preceeding] paragraphs of the said complaint, in which an effort is made to maintain a bill in equity for the purpose of testing the constitutionality of the laws of the State of Arkansas applicable to railroads and railroad rates, without reference to any existing and actual cause of complaint, these defendants aver, as they are advised, that such matters are not within

the jurisdiction of a Court of equity, and do not present a case for equitable relief.

(18) For answer to paragraph marked 11th of the said complaint, said defendants say they do not know and are not advised whether Henry Leigh and George McLean, their co-defendants, are in the habit of traveling on plaintiff's trains or not, nor whether they are large shippers of freights on the lines of railroad of the complainant, but they admit that a large number of persons residing in the said State are in the habit of traveling on complainant's passenger trains between stations in said State. They deny that if the complainant shall disregard, violate or refuse to put in force the aforesaid rates prescribed by said Commission for the transportation of freight and passengers, or any or either of said roads, or shall violate or fail to carry into effect any of the provisions, rates, charges, orders, rules, regulations or classifications prescribed by said Commission, on the ground that the same are unjust or unfair or unreasonable, or confiscatory, or in violation of the constitution or laws of the United States, that the said Commission will cause penalty suits to be instituted against it as authorized by the provisions of the aforesaid statutes through the prosecuting attorneys of the various judicial districts of the State. They deny that at present a greater number of suits for the recovery of penalties for any prospective violations of rates continued in the schedule known as Standard Freight Distance Tariff No. 3 are in contemplation. They deny that any suits
45 will be brought against the complainant for the violation of each of the rates for the transportation of passengers as well as freight between the many stations on its line of railroad, or that any large number of suits for penalties or double damages will be brought against complainant by these defendants or by any of defendants who are shippers and patrons of complainant, or others of the same class involving a large number of suits in many counties of the State. But they admit that if suits are brought it may be that the said complainant will be ordered to produce its books and papers in the defense of such cases, but no more so than other persons whose defense depends upon books of account. They deny that the said complainant had been afflicted with suits for acts of wrongdoing done by it to the shippers and other residents within the State of Arkansas, but aver, on the contrary, that the disposition of the people of the said State and of the said Railroad Commission has been to overlook most of the acts of wrong, if not nearly all the acts of wrong, done by said complainant, except in instances where the wrongdoing of the said complainant was of so aggravating a character and involving such gross discrimination in favor of its own coal mines as to justify action upon the part of the said Railroad Commission. And they say that if the said Commission ever had to institute suits, they were finally decided in favor of the contention of the said Railroad Commission. And they further say that all cases where the acts of the General Assembly of the State of Arkansas came up for consideration relating to the [*duites*] of the common carriers by rail, the acts have been so construed as to give the said common carriers the benefit of any reasonable excuse they had for not complying with said provi-

sions of the statutes. They deny that any improper expense would be entailed by the said complainant by reason of the enforcement of any of the said rates, rules, regulations of said Commission, or that it would be in any manner great or involve great or serious loss to complainant. And they say that if the complainant is correct in saying that it would be precluded from pleading or proving the unreasonableness of said rates and proceedings instituted by private shippers it could correct the same by testing the reasonableness thereof in a direct proceeding had for that purpose. But they say, as they have heretofore said, that by the provisions of the statutes of Arkansas, that rates fixed by said Railroad Commission are not conclusive; that it can be shown in defense thereto that they are unjust, and the only effect they have is that they are taken to be prima facie binding until they have been shown to be unreasonable, and for that
46 reason, unenforceable. They deny that the question as to whether the rates prescribed by the Commission are reasonable or not could not be properly determined in a suit of that character, or that the loss sustained by the complainant in an attempt to defend such suits would be serious or would be irreparable.

And having answered, these defendants ask that the complaint be dismissed, and that they be permitted to go hence with their costs.

(Signed) W. F. KIRBY, *Attorney General;*
ROSE, HEMINGWAY,
CANTRELL AND LOUGHBOROUGH,
MORRIS M. COHEN,
Solicitors for Defendants.

STATE OF ARKANSAS,
County of Pulaski, ss:

J. E. Hampton, one of the defendants herein, being duly sworn, says that the matters and things set out in the foregoing answer as being based on personal knowledge are true, and that the matters and things set out as being upon information, he believes to be true.

(Signed) JOHN E. HAMPTON.

Subscribed and sworn to before me this 25th day of July, 1908.

(Signed) NOEL LOEB,
[SEAL.] *Notary Public.*

My Commission expires January 6th, 1910.

Endorsed: Filed July 25th, 1908. W. P. Feild, Clerk.

(Restraining Order.)

Before Judge Van Devanter. September 3, 1908.

No. 1637.

ST. LOUIS, IRON MOUNT[illegible] SOUTHERN RAILWAY COMPANY

vs.

ROBERT P. ALLEN, JOHN [illegible]OCKETT, JOHN E. HAMPTON, Railroad Commissioners of the State of Arkansas, Henry Leigh and George McLean.

This cause came on to be heard on the motion of the complainant for a temporary restraining order, and after the submission of the proof, was argued by counsel, and now, upon consideration thereof, it is ordered as follows:

47 That as to the complainant, all the rates prescribed by the defendants, The Railroad Commissioners of the State of Arkansas, for transporting and carrying intrastate freights in said State in Standard Freight Distance Tariff No. 3, which was issued by orders of said Commissioners, which took effect on June 15th, 1908, and all amendments and supplements thereto, be and are hereby suspended and the enforcement of each and all thereof be and the same is hereby restrained and enjoined until the further order of the Court.

It is further ordered that the enforcement of the two cents per mile rate prescribed in an Act of the Legislature of the State of Arkansas, approved February 9, 1907, entitled "An Act to Amend Section 6611 of Kirby's Digest of the Statutes of Arkansas, by fixing passenger rates in this State and for other purposes," and also prescribed in the order made by the defendants, the Railroad Commissioners of the State of Arkansas, on May 15, 1907, putting in force the rates prescribed by the aforesaid statute be and the same are hereby suspended and restrained as to the complainant herein until the further order of the Court.

It is further ordered that no suit or suits, action or actions shall at any time be instituted or maintained against the complainant, its officers, agents and employees by any of the defendants for or on account of its failure to continue and keep in force any of the aforesaid inhibited rates, during the time this order shall continue in force, and that the defendants, the Railroad Commissioners of the State of Arkansas, be and they are hereby enjoined from at any time instituting or prosecuting any suit or action as aforesaid, or causing the same to be instituted or prosecuted by any officer, agent or attorney of said Commission, or by any officer of the State of Arkansas, or any other persons for a failure to keep in effect and observe the aforesaid inhibited rates; that the defendants, Henry Leigh and George McLean, and all other persons and each of them from and after the time that they shall have knowledge of this order be enjoined from at any time instituting any such suit or

action for or on account of any failure of the complainant to keep in effect and observe said inhibited rates or for the recovery of damages by reason of such failure, during the time this order shall continue in effect.

It is further ordered that the complainant execute a bond to the United States of America in the penal sum of Two Hundred Thousand Dollars ($200,000.00), conditioned that the said complainant shall keep a correct account, showing, as respects the
48 carriage of passengers and freight, the difference between the tariff actually charged and that which would have been charged had the rates inhibited hereby been applied, showing the particular carriage in question and the stations between which the same occurred, and the name of the person affected, so far as may be practicable, which record shall be made and kept subject to the further order of this Court, and further conditioned that if it shall eventually be decided that so much of this order as inhibits the enforcement of the existing rates should not have been made, that said complainant shall, within a reasonable time, to be fixed by the Court, refund in every instance to the party entitled thereto the excess of charge over what would have been charged had the inhibited rate been applied, together with lawful interest and damages.

It is further ordered that this order suspending the aforesaid rates and restraining the defendants take effect upon the filing of the aforesaid bond and the approval thereof by the Clerk of this Court, but not within less than ten days hereof. Nothing recited in this order shall operate to prevent the said Railroad Commissioners of the State of Arkansas from establishing and enforcing any reasonably compensatory and lawful rates in place of those whose enforcement is hereby inhibited.

Dated September 3rd, 1908.

(Signed) WILLIS VAN DEVANTER,
Circuit Judge.

(*Record Entry of Filing of Injunction Bond, September* 12, 1908.)

Comes the complainant by Thos. M. Mehaffy, Esq., its solicitor and files herein its bond in the sum of Two Hundred Thousand Dollars ($200,000.00) with the United States Fidelity and Guaranty Company, as surety, which bond is approved by the Clerk of this Court, as required under restraining order of this Court of September 3rd. 1908.

Injunction Bond.

Know All Men By These Presents, that the above complainants as principal, and the United States Fidelity and Guaranty Company, a corporation of the State of Maryland, as surety, are held and firmly bound unto t-e United States of America in the penal sum of Two Hundred Thousand Dollars ($200,000.00), well and truly
49 to be paid in lawful money of the United States, for the payment of which they bind themselves, their successors and assigns firmly by these presents.

Signed with our hands, and sealed with our seals and dated this 11th day of September A. D. 1908.

This bond is made upon the following conditions, to-wit:

Whereas, the Court in the above entitled cause, made an order on the 3d day of September, A. D. 1908, granting a restraining order and providing among other things as follows, towit:

"It is further ordered that complainant execute a bond to the United States of America in the penal sum of Two Hundred Thousand Dollars ($200,000.00), conditioned that said complainant shall keep a correct account showing, as respects every [carr*aige*] of passengers or freight, the difference between the tariff actually charged and that which would have been charged had the rate inhibited hereby been applied, showing the particular [carr*aige*] in question and the stations between which the same occurred, and the name of the person affected as far as may be practicable, which record shall be made and kept subject to the further order of this Court, and further conditioned that if it should eventually be decided that so much of this order as inhibits the enforcement of existing rates should not have been made, that said complainant, shall, within a reasonable time, to be fixed by the Court, refund in every instance to the party entitled thereto, the excess in charge over what would have been charged had the inhibited rates been applied, together with lawful interest and damages."

Now, if the above named complainant, St. Louis, Iron Mountain and Southern Railway Company, shall well and truly keep and perform all [*in*] singular the conditions of said restraining order as above set forth, then this obligation shall be null and void, otherwise to be and remain in full force and effect.

In Testimony Whereof, the above bounden principal has caused its corporate name to be hereunto subscribed by its Vice-President and its corporate seal to be hereunto affixed and duly attested, and said surety has caused its corporate name to be hereunto subscribed, and its corporate seal to be hereunto affixed, by Sam W. Reyburn and D. H. Cantrell, its duly authorized attorneys in fact for this purpose this 11th [*fay*] of September, A. D. 1908.

[SEAL.] ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
By C. S. CLARK, *Vice-President.*

Attest:
F. W. IRELAND,
Assistant Secretary.

[SEAL.] UNITED STATES FIDELITY AND GUARANTY CO.,
By SAM W. REYBURN,
D. H. CANTRELL, *Attorneys in Fact.*

The foregoing bond is approved this 12th day of September, 1908.
W. P. FEILD, *Clerk.*

Endorsed: Filed September 12th, 1908. W. P. Feild, Clerk.
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(*Order Requiring the Filing by Complainant of an Additional Bond.*)

Before Judge Trieber. June 23, 1909.

On this day come the parties in said cause, and it is thereupon ordered that complainant execute a bond to the United States of America in the sum of Eight Hundred Thousand Dollars (800,000.00), signed by itself, without additional sureties, conditioned that it shall, on and after July 1st. 1909, issue to each person purchasing a ticket or paying cash fare upon the train from one point in the State of Arkansas to another point in the same State, and confined exclusively to intrastate travel, a certificate or coupon showing the amount paid by such passenger for such ticket and the date thereof; and to every shipper or consignee when paying freight on any commodity shipped from one part of the State of Arkansas to another part and which is wholly the subject of intrastate traffic a receipt or freight bill showing the amount charged for such carriage of freight, and also endorse on the same bill the amount or rate which would have been charged had the inhibited rates continued in force; which receipt, or coupon or freight bill shall be prima facie evidence of the amount paid and the date of payment. The complainant shall keep a correct account showing as respects the carriage of freight and passengers, the difference between the amount actually charged and that which would have been charged had the inhibited rates been applied, and further conditioned that if it should eventually be decided that so much of this order as inhibits the enforcement of the rates prescribed by the Railroad
51 Commission of the State of Arkansas in Distance Tariff No. 3, and the two cent per mile rate prescribed by the statute of 1907, should not have been made, that the complainant shall refund to the owners and holders of the certificates issued by it the excess charges as shown by the same, provided, however, that such certificates as to the amounts and dates shall only be prima facie evidence of these facts.

Such bond shall be in addition to the bond heretofore executed and not in lieu thereof.

(Signed) JACOB TRIEBER, *Judge.*

(*Record Entry of Filing of Additional Bond, July 5, 1909.*)

Comes the complainant by John M. Moore, Esq., its solicitor, and files herein its additional bond for the sum of Eight Hundred Thousand Dollars ($800,000.00), as required by order of Court, dated June 23rd. 1909, and said bond having been examined by the Judge of this Court, the same is approved.

(Additional Injunction Bond.)

Know All Men By These Presents: That the St. Louis, Iron Mountain and Southern Railway Company is held and firmly bound unto the United States of America in the penal sum of Eight Hundred Thousand Dollars ($800,000.00) for the payment of which it hereby binds itself, its successors and assigns.

The condition of this obligation is such that:

Whereas, in a suit of the above bounden (a corporation) against Robert P. Allen, John W. Crockett and John E. Hampton, Railroad Commission of the State of Arkansas, Henry Leigh and George McLean, an order of temporary injunction was issued enjoining and restraining the defendant Railroad Commissioners of the State of Arkansas from enforcing certain freight and passenger rates in said State; and,

Whereas, it was subsequently ordered in said proceedings:

"That complainant execute a bond to the United States of America in the penal sum of Eight Hundred Thousand Dollars ($800,000.00) signed by itself without additional sureties, conditioned that it shall, on and after July 1st, 1909, issue to each person purchasing a ticket or paying cash fare upon the train from one point in the State of Arkansas to another point in the same State,
52 and confined exclusively to intrastate travel, a certificate or coupon showing the amount paid by such passenger for such ticket and the date thereof; and to every shipper or consignee when paying freight on any commodity shipped from one part of the State of Arkansas to another part and which is wholly the subject of intrastate traffic, a receipt or freight bill, showing the amount charged for the carriage of such freight, and also endorse on the same bill the amount or rate which would have been charged [has] the inhibited rate continued in force; which receipt or coupon or freight bill shall be prima facia evidence of the amount paid and the date of payment. The complainant shall keep a correct account showing as respects the carriage of freight and passengers, the difference between the amount actually charged and that which would have bene charged had the inhibited rates been applied, and further conditioned that if it should eventually be decided that so much of this order as inhibits enforcement of the rates prescribed by the Railroad Commission of the State of Arkansas in Distance Tariff No. 3, and the two cent per mile passenger rate prescribed by the Statute of 1907, should not have been made, that the complainant shall refund to the owners and holders of the certificates issued by it, the excess charges as shown by the same, provided, however, that such certificates as to the amounts and dates shall only be prima facia [evcidence] of these facts," and

Now, therefore, [is] the said St. Louis Iron Mountain and Southern Railway Company shall comply with and perform each and all of the terms, conditions and provisions above set forth, and shall issue the certificates or coupons to passengers, receipts or freight bills to shippers and consignees and keep the accounts as required by

said order to be kept, and make the payments or refunds as therein provided to be made, if it should eventually be decided that so much of said order of injunction as inhibits the enforcement of said inhibited rates should not have been made, then this obligation shall be null and void, otherwise to remain in full force and effect.

In Witness whereof, the said St. Louis, Iron Mountain and Southern Railway Company, has caused these presents to be executed this the third day of July, 1909.

(Signed) ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, [SEAL.]
By C. S. CLARKE, *Vice-President.*

Attest:
F. W. IRELAND,
Assistant Secretary.

53 Approved:
JACOB TRIEBER, *Judge.*

Endorsed: Filed July 5th, 1909. W. P. Feild, Clerk.

(*Final Decree, May* 11, 1911.)

No. 1637.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
vs.
ROBERT P. ALLEN, GEORGE W. BELLAMY, and WILLIAM F. McKNIGHT, Railroad Commissioners of the State of Arkansas; Henry Leigh and George McLean.

Now on this day comes the complainant, by its solicitors, Moore, Smith and Moore, Esqs., and also come the defendants, by their solicitors, Joseph M. Hill and James H. Harrod, Esqs., and thereupon said cause having been argued and submitted upon the evidence and stipulations on file and of record in said cause, and having been taken under advisement at a former term of this Court, and the Court being well and sufficiently advised in the premises,

It is accordingly ordered and decreed that the defendants, Robert P. Allen, George W. Bellamy, and William F. McKnight, as Railroad Commissioners of the State of Arkansas, and Henry Leigh and George McLean, and each of them, their agents, employees and successors, as well as all other persons patrons of complainant, either in the shipment of freight, or as passengers between stations on complainant's road in the State of Arkansas, are hereby perpetually enjoined from enforcing or attempting directly or indirectly by any suit or in any manner whatsoever to enforce against the complainant, its officers, agents, employees or servants, any of the provisions of Standard Freight Distance Tariff No. 3, and amendments thereto adopted prior to the institution of this action, pre-

scribing the rate or rates for the transportation of classes and commodities or any provision of said tariff whereby any of said rates shall be continued in force, or from enforcing or attempting directly or indirectly, by any suit or in any other manner whatsoever, to enforce against the complainant, its officers, agents, or servants, any of the provisions of an Act of the General Assembly of the State of Arkansas, entitled: "An Act to Amend Section 6611 of Kirby's Digest of the Statutes of Arkansas, by Fixing Passenger Rates in this State and for Other Purposes," approved February 9th, 1907, or to enforce the provisions of any other Act or Acts of the Legislature of said State providing penalties for non-compliance by
54 complainant with the provisions and requirements of Standard Freight Distance Tariff No. 3, and amendments thereto as aforesaid, or the aforesaid Act of the Legislature of the State of Arkansas, fixing passenger rates in said State.

It is further ordered that the costs incurred by the complainant and defendants respectively, in procuring the attendance of witnesses before the Master and the payment of the fees of stenographers in the recording of said testimony be borne by the complainant and the defendants, Robert P. Allen, George W. Bellamy and William F. McKnight, and that neither party recover from the other therefor; that all remaining costs including Master's fees, the complainant pay one-fourth and the defendants, Robert P. Allen, George W. Bellamy and William F. McKnight, Railroad Commissioners as aforesaid pay one half, the other one-fourth to be paid by the complainant in case No. 1636, the payment of said costs to be [receover-] by execution to be issued by the Clerk of this Court upon application of either party in interest.

It is further ordered that the bond for injunction filed by the complainant here be released and the sureties thereon discharged from liability.

And the Court reserves and retains unto itself jurisdiction of the subject matter of this suit and of all parts thereto to the end that such other and further orders and decrees may be made herein as may become necessary herein by reason of any changed conditions as to the facts, equities or rights that may hereafter take place or arise.

(Signed) JACOB TRIEBER, *Judge.*

(*Record Entry of Filing of Mandate of Supreme Court, Mandate, and Order of District Court Thereon, June* 18, 1913.)

Be it remembered, that at a District Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday, the Seventh day of April Anno Domini. One Thousand, Nine Hundred and Thirteen at the United States Court Room, in the City of Little Rock, Arkansas, the Honorable Jacob Trieber Judge presiding and holding said Court, the following procedings were had, to-wit: July 18th, 1913:

55 **No. 1637.**

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY,
vs.
GEORGE W. BELLAMY, WILLIAM F. MCKNIGHT, and J. SAM ROWLAND, Railroad Commissioners of the State of Arkansas.

This cause came on for hearing this day, the parties appearing by their respective solicitors, and thereupon the defendants filed the Mandate of the Supreme Court of the United States in this cause under the style of Robert P. Allen, George W. Bellamy and William F. McKnight, Railroad Commissioners of the State of Arkansas, Henry Leigh and George McLean vs. St. Louis, Iron Mountain and Southern Railway Company, which Mandate is in words and figures as follows, to-wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Eastern District of Arkansas, Greeting:

[Seal of the Supreme Court of the United States.]

Whereas, lately in the Circuit Court of the United States for the Eastern District of Arkansas, in a cause between St. Louis, Iron Mountain and Southern Railway Company, complainant, and Robert P. Allen, George W. Bellamy and William F. McKnight, Railroad Commissioners of the State of Arkansas, and Henry Leigh and George McLean, defendants, No. 1637, wherein the decree of said Circuit Court, entered in said cause on the 11th day of May, A. D. 1913, is in the following words, viz:

"Now on this day comes the complainant by its solicitors, Moore, Smith and Moore, Esqs., and come the defendants, by their solicitors, Joseph M. Hill and James H. Harrod, Esqs., and thereupon said cause having been argued and submitted upon the evidence, and stipulations on file and of record in said cause, and having been taken under advisement at a former term of this Court, and the Court being well and sufficiently advised in the premises,

It is accordingly ordered and decreed that the defendants, Robert P. Allen, George W. Bellamy and William F. McKnight, as Railroad Commissioners of the State of Arkansas, and Henry Leigh and George McLean and each of them, their agents, employees and successors as well as all other persons, patrons of complain-
56 ant, either in the shipment of freight or as passengers, or as passengers between stations on complainant's road in the State of Arkansas, are hereby perpetually enjoined from enforcing or attempting directly or indirectly, by suit or in any manner whatsoever to enforce against the complainant, its officers, agents, employees, or servants any of the provisions of Standard Freight Distance Tariff No. 3, and amendments thereto adopted prior to the institution of this action, prescribing the rate or rates for the transportation of classes and commodities or any provision of said

tariff whereby any of said rates shall be continued in force, or from enforcing or attempting, directly or indirectly, by suit, or in any manner whatsoever, to enforce against complainant, its officers, agents or servants, any of the provisions of an Act of the General Assembly of the State of Arkansas, entitled, "An Act to Amend Section 6611 of Kirby's Digest of the Statutes of the State of Arkansas, by Fixing Passenger Rates in this State, and For Other Purposes," approved February 9th, 1907, or to enforce the provisions of any other Act [*of*] Acts of the Legislature of the said State, providing penalties for noncompliance by complainant with the provisions and requirements of said Standard Freight Distance Tariff No. 3 and amendments thereto as aforesaid, or the Act of the Legislature of the State of Arkansas, fixing passenger rates in said State.

It is further ordered that the costs incurred by the complainant and defendants in procuring the attendance of witnesses before the Master and in payment of the fees of stenographers in the recording of said testimony, be borne by the complainant and the defendants, Robert P. Allen, George W. Bellamy and William F. McKnight, and that neither party recover from the other therefor; that all remaining costs including Master's fees, the complainant pay one-fourth and the defendants, Robert P. Allen, George W. Bellamy and William F. McKnight, Railroad Commissioners aforesaid, pay one-half, the other one-fourth to be paid by the complainant, in case No. 1636 the payment of said costs to be recovered by execution to be issued by the Clerk of this Court upon the application of any party in interest.

It is further ordered that the bond for injunction filed by the complainant herein be released and the sureties thereon discharged from further liability.

And the Court hereby retains and reserves unto itself jurisdiction of the subject matter of this suit and of all parties thereto, to the end that such other and further orders and decrees may be
57 made herein as may become necessary by reason of any changed conditions as to the facts, equities or rights that may hereafter take place or arise.

(Signed) JACOB TRIEBER, *Judge.*

as by the inspection of the transcript of the record of said cause of the said Circuit Court, which has been brought into the Supreme Court of the United States by virtue of an appeal taken by Robert P. Allen, George W. Bellamy and William F. McKnight, Railroad Commisioners of the State of Arkansas, agreeably to the Act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and twelve, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now here ordered adjudged and decreed by this Court that the decree of the said Circuit Court in

this cause be, and the same is hereby, reversed with costs; and that the said Robert P. Allen, et al., Commissioners, etc., recover against the said complainant Three Thousand One Hundred and Two Dollars and Fifty-two Cents for their costs herein expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of Arkansas, with direction to dismiss the bill without prejudice. June 16th, 1913.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and Justice, and the Laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eleventh day of July, in the year of our Lord, one thousand nine hundred and thirteen.

Cost of Allen, et al.:

Clerk	$1,334.40
Printing Record	$1,748.12
Attorney	20.00
Total	$3,102.52

(Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

58 Thereupon, in obedience to the foregoing mandate, it is by the Court, ordered, adjudged and decreed that the bill of complaint of the plaintiff herein originally brought against Robert P. Allen, John E. Hampton and John W. Crockett, Railroad Commissioners of the State of Arkansas, and Henry Leigh and George McLean, and in which action, by appropriate orders heretofore made, William F. McKnight, George W. Bellamy and J. Sam Rowland have been substituted as defendants, as successors of the former defendants, the Railroad Commission of the State of Arkansas, be and the same is hereby dismissed without prejudice.

It is further ordered, adjudged and decreed by the court that the temporary and permanent injunctions heretofore granted in this cause be, and the same is hereby, dissolved, and that the defendants, the Railroad Commission of the State of Arkansas, do have and recover of and from the complainant herein all their costs herein expended by them, including the costs adjudged to them by the Supreme Court of the United States in this cause, for which execution may issue as in actions at law. That the said costs be taxed by the Clerk of this Court subject to review upon the request of either party, by the Court.

And thereupon, the Court, of its own motion, and against the objection of the complainant, refers, under rule 15 of this Court, the matter of damages alleged to have ben sustained by the defendants,

the Railroad Commission of the State of Arkansas, by reason of the granting of the temporary and permanent injunctions herein, to Jeremiah G. Wallace, Esq., who is hereby appointed a Special Master for the purpose of determining the damages sustained. That in determining these damages, for the recovery of which the said Commissioners are not acting for themselves but for the benefit of all persons, shippers, consignees and passengers, who have sustained any damages by reason of the granting of said injunctions, the Master is hereby authorized, for the purpose of ascertaining these facts, to examine witnesses, administer oaths, and call upon the plaintiff herein for any books or papers, or transcripts thereof, which, in his opinion, are necessary for the purpose of enabling him to determine any facts in issue in connection with any claim filed with him.

It is further ordered by the Court that any books, reports or transcripts thereof, called for by said Master shall be furnished by the plaintiff herein as speedily as possible.

59 And the Master is further directed to give notice by publication in seven newspapers published in the State of Arkansas, one published in each of the following cities in the State, to-wit: Little Rock, Ft. Smith, Pine Bluff, Texarkana, Camden, Jonesboro and Helena, and also in such other papers as the Master may deem proper, to the effect that all persons having any claims against the complainant by reason of the granting of the injunctions herein, shall present the same to him on or before the 1st day of November, 1913, by filing with him the evidence of their claims, or such other proof as they possess. That said notice shall be published in said newspapers once a week for four weeks in all of said papers.

The Master will report separately all claims which arose under the first temporary injunction granted by the Honorable Willis Van Devanter; next, of all claims which arose under the bond executed in pursuance of the order made by the Honorable Jacob Trieber, District Judge, in this case, and next report all claims which arose after the final decree making the injunction permanent was rendered.

The Master is hereby authorized to employ such clerical assistance as in his judgment may be necessary for the purpose of aiding him in the performance of his duties.

The complainant is directed to instruct its agents [*for*] to furnish the shippers and consignees whose bills have been lost, mislaid or destroyed, or are in the possession of the complaint, such information as appears from their records or is in their possession, to enable the parties to prepare their claims.

The Master will make a report of his findings to the Court, together with any evidence that may have been taken.

The Court reserves the power to make any additional orders or instructions for the guidance of the Master in this cause.

And thereupon complainant, by leave of the Court, files its objections in writing to so much of this decree as refers the matter of alleged damages to a Master.

(Signed) JACOB TRIEBER, *Judge.*

(*Order, October* 17, 1913, *Extending Time for Filing of Claims Before the Special Master.)*

Now on this day came on to be heard the application for an extension of the time in which to file claims before the Special
60 Master herein, the parties appearing by their respective solicitors, and the Court being well and sufficiently advised in the premises,—

It is therefore ordered that the time for filing claims before the Special Master be and the same is hereby extended until January 1st, 1914.

(Signed) JACOB TRIEBER, *Judge.*

(*Record Entry of Filing of Supplemental Bill of Complaint, January* 9, 1914.)

No. 1637.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY
vs.
HOWARD H. GALLUP and WILLIAM J. METCALF and GEORGE W. Bellamy, William F. McKnight and J. Sam Rowland, Railroad Commissioners of the State of Arkansas.

Comes the complainant by Moore, Smith and Moore, Esqs., its solicitors and files herein, by leave of the Court, its supplemental bill of complaint herein.

Supplemental Bill of Complaint.

Complainant by leave of the Court first had and obtained files herein its supplemental bill of complaint, and thereupon alleges:

That on the 18th day of July, 1908, it owned and was operating in said State a main line of railroad extending from the City of Texarkana, in said State, to the City of St. Louis, in the State of Missouri, with a branch extending from Newport, in Jackson County, to Carthage, Missouri.

That on the day aforesaid it filed its complaint in this Honorable Court against Robert P. Allen, John W. Crockett, and John E. Hampton, as Railroad Commissioners of the State of Arkansas, Henry Leigh and George McLean, as passengers and shippers of freight on complainant's aforesaid line of railroad in said State, and as representatives of each of said classes, the same being numerous, and it being impracticable to make all persons of either class parties to said proceedings. The defendants in said proceeding constituted the Railroad Commission created by and under the statutes of said State for the purposes, among other things, of fixing rates to be charged on railroads in said State and for the trans-

portation of persons and property within the limits of said State. Said Commissioners were authorized and empowered to make and put in effect rates for the carrying of freight and passengers
61 on all railroads engaged in transporting persons and property in said State, and to enforce the observance of all such rates by prosecutions for penalties prescribed in the statute of said State. That the statutes in force in said State at the time said suit was instituted by complainant prescribed severe penalties for the failure or refusal of any person or corporation to observe the rates prescribed by said Commission or by any law of said State for the transportation of freight and passengers. That on the 9th day of February, 1907, the Governor of the State approved an Act passed by the General Assembly of the State of Arkansas, which provided that the maximum sum which any corporation or person operating a railroad in said State should be authorized to charge for carrying passengers within the State should not exceed two cents per mile on all lines of railroad over eighty-five miles in length, and providing that said act should take effect sixty days after its passage.

On May 15th, 1907, said Railroad Commissioners promulgated an order for carrying into effect the aforesaid statute regulating charges for the transportation of passengers.

On June 4th, 1908, said Commission adopted Standard Freight Distance Tariff No. 3, applying on classes and commodities offered for transportation between all railroad stations in said State.

It was alleged in said bill of complaint that the aforesaid rates prescribed by the statute and by said Commissioners for the transportation of freight and passengers in said State were unreasonable and confiscatory. Complainant prayed the said rates be set aside as void and said Commissioners and all [shipper-] of freight and passengers carried on its said lines of railroad as passengers be enjoined from enforcing the same or from bringing any suit or suits or from instituting any proceeding or proceedings in the courts for that purpose.

A temporary injunction was granted in accordance with the prayer of said bill of complaint by the Honorable Willis Van Devanter, Circuit Judge of the Eighth Judicial Circuit of the United States, on the 3rd day of September, 1908. The order granting said injunction required the complainant to execute a bond to the United States in the penal sum of Two Hundred Thousand Dollars ($200,000.00) conditioned that it would keep a correct account showing the difference between the tariff actually charged by complainant after the granting of the said injunction, and that which would have been charged had the rates inhibited by said order of injunction been applied, and the stations between which the
62 same occurred, which record said order provided should be made and kept subject to the further order of the Court and conditioned that if it should eventually be decided that the order inhibiting the [enforcement] of the then existing rates should not have been made, that the complaint should, within a reasonable time, to be fixed by the Court, refund in every instance to the party entitled thereto the excess of charge over what would have been

charged had the inhibited rate been applied, with lawful interest and damages. Complainant filed a bond in pursuance of said order and conditioned as therein provided.

At the October Term, 1908, of said Court, to-wit: on February 18th, 1909, the defendants in the aforesaid proceeding filed a petition in this Honorable Court, praying that the injunction heretofore granted in said cause as aforesaid be dissolved or modified on the ground that the complainant therein and herein had since the granting of said injunction put into effect freight and passenger rates on intra-state shipments that were unreasonable and exorbitant, and praying that said injunction be modified so as to require the complainant in said proceeding to establish reasonable rates during the pendency of the litigation, and to furnish additional bond and to keep a correct account showing the difference between the rates charged by the complainant and the inhibited rates. Said motion coming on for hearing on the 1st day of June, 1909, an order was entered in said cause, requiring the freight rates pending said action to be so arranged as to produce a net increase of thirty-three and one-third per cent of the revenue produced by the inhibited rates and that the same should be put into effect not later than June 7th, 1909, and to continue in force until the further order of the Court, and thereafter a schedule of rates agreed upon between the complainant and the defendants in said cause, and known as the "Court Rate" was put into effect and continued in force during the pendency of said proceeding and until the aforesaid order entered on the 18th day of July, 1913, dismissing the bill in said cause.

A further order was entered in said cause requiring the complainant to execute a bond to the United States in the sum of Eight Hundred Thousand Dollars ($800,000.00) conditioned that on and after July 1st, 1909, complainant should issue to persons purchasing tickets or paying cash fare between points in said State coupons showing the dates and amounts of said payments, and to furnish shippers of freight receipt or freight bills showing the amount charged for the carriage of such freight, the amount or rate
63 which would have been charged under the inhibited rates, and to keep an account showing the difference between the amount actually [charge-] for the carriage of freight and passengers and that which would have been charged had the inhibited rates been applied; and further conditioned that complainant should refund to the owners and holders of certificates issued by it the excess charges as shown by the same. On the 5th day of July, 1909, complainant filed an additoinal bond in the sum of Eight Hundred Thousand Dollars ($800,000.00) in conformity with and containing the conditions prescribed in said order.

On the 11th day of May, 1911, that being a day of the April Term, 1911, of said Court, said cause coming on for hearing on the pleadings and the evidence introduced therein, a final decree was entered therein perpetually enjoining the defendants therein, and all other patrons of said complainant, either in the shipment of freight or as passengers between stations on complainant's railroad in the State of Arkansas, from enforcing or attempting, directly or indi-

rectly, by any suit or in any manner whatsoever, to enforce the aforesaid passenger rates or any of the rates prescribed in Standard Freight Distance Tariff No. 3 as aforesaid, or to enforce any of the provisions of any statute of said State providing for penalties for non-compliance by complainant with the aforesaid freight and passenger tariffs, and releasing the bonds for injunction filed in said cause, and the sureties thereon from further liability.

On June 26th, 1911, the defendants, Robert P. Allen, George W. Bellamy and William F. McKnight, as Railroad Commissioners, the said Bellamy and McKnight having succeeded the said Crockett and Hampton as such Commissioners, and been substituted as defendants in their stead, filed their prayer for appeal to the Supreme Court of the United States from the aforesaid decree of this Honorable Court and Assignment of Errors, which appeal was allowed, the said defendants, Henry Leigh and George McLean having declined to join in said appeal. Said cause came on for hearing in the said Supreme Court of the United States and on the 16th day of May, 1911, an order was entered therein reversing the decree of this Court and remanding said cause with directions that said proceedings be dismissed without prejudice.

On the 18th day of July, 1913, the mandate of the Supreme Court in the aforesaid proceeding having been filed in the office of
64 the Clerk, an order was entered dismissing complainant's aforesaid bill without prejudice in conformity therewith and dissolving the temporary and permanent injunctions therein granted in said cause. It was further ordered, over complainant's objection, that said cause be referred to a Special Master, appointed by the Court, for the purpose of determining the damage sustained by the defendants acting for the benefit of all persons, shippers, consignees and passengers who have sustained any damage by reason of the granting of said injunctions. Said order directed the Special Master to give notice by publication in the manner prescribed that all persons having any claims against complainant by reason of the granting of said injunctions should present the same to him on or before the 1st day of November, 1913, by filing with him the evidence, or such proof as might be in their possession, of their claims, and directing the Master to make a report of his findings to the Court, together with any evidence that may have been taken by him. Complainant here refers to all of the aforesaid proceedings, orders, decrees now of record in this cause, and makes the same a part of this its bill as if the same were herein fully set out at length.

Said cause is still pending and undetermined in this Court on the aforesaid reference to the Special Master.

Complainant further alleges that the defendant, Howard H. Gallup, not withstanding the aforesaid proceedings and orders of this Honorable Court, and the election of the defendants therein as the representatives of record of all passengers and shippers on complainant's said railroad within said State to proceed in this Court by a reference to the Special Master appointed by the Court to take an account of the damages sustained by all shippers and passengers in said State by reason of the granting of said injunctions, has insti-

tuted an action in the Chancery Court of Baxter County of said State, in which he alleges that complainant herein demanded and received from him rates for transporting him as a passenger and for the transportation of freight between stations in said State in excess of the rates inhibited by the injunctions and the orders made and entered by the Court in the aforesaid proceeding between complainant and the Railroad Commissioners of said State amounting in the aggregate to the sum of $5,000.00, and seeks to recover of complainant the difference between the rates prescribed in Distance Tariff No. 3 aforesaid, promulgated and put in force and effect by said Railroad Commission as aforesaid and the rates charged the said Gallup by the complainant during the time said injunction
65 was in force, and also the difference between two cents per mile, that being the statutory rate promulgated by said Commission for the transportation of passengers, and three cents charged by complainant during the time the aforesaid injunction was in force.

Complainant alleges that one William J. Metcalf, a citizen of Baxter County in said State, and a large number of persons who were passengers and shippers on complainant's railroad during the time said order of injunction was in force, too numerous to be named specifically herein, are also threatening to institute similar actions against complainant.

Complainant further represents that a very large number of claims for refund of charges in excess of the aforesaid inhibited rates during the time said orders of injunction were in force, amounting to more than half a million dollars, have been filed before the Special Master appointed in said cause and are now under investigation by said Master, which proceeding involves a very large amount of expense in the way of Master's cost. That in many instances duplicate claims covering the same shipment by parties severally claiming to be entitled to the alleged excessive charges have been filed and it will be necessary to determine who, among said claimants, is entitled to recover any allowance that may be made by the Master, in that behalf. That many claimants who are denied the right of recovery by the Master are threatening to bring independent suits against the complainant for the recovery of the claims so presented and refused by the Master, and complainant represents that unless an order is issued in this cause, enjoining and restraining proceedings for the recovery of overcharges, that is to say charges in excess of those prescribed in Tariff No. 3, aforesaid, for the transportation of freight, and the charges prescribed for the transportation of passengers during the pendency of the aforesaid proceedings and the time said orders of injunction were in force, many thousands of suits will be instituted against complainant by passengers and shippers on its said railroad, during the time said injunction was in force; that the Complainant will be required to produce its books and records in defense of each of the numerous cases brought against it for the purpose of showing the difference between the inhibited rates and those actually charged by it, and will be put to great expense and greatly [harrasse-] by being compelled to defend such a multitude of suits;

that many of the suits so instituted will embrace claims that
66 have already been passed upon by the Special Master appointed in the aforesaid cause, and in many of which allowances have been made to other parties, who were adjudged in said proceeding to be entitled to reparation on account of the alleged overcharge, and thereby complainant will be exposed to great loss and damage by reason of double recoveries in favor of different parties upon the same claim, or else put to a very great expense, trouble and hazard, in order to prevent great and irreparable loss and injury by reason of actions based upon claims presented to and allowed by the Special Master under the reference made to him in said cause as aforesaid; [complain-] further alleges that the expense involved in the defense of such suits as will be instituted against it, unless a restraining order is issued, would be very great and would involve great and serious loss to complainant without regard to the result of said litigation, notwithstanding that this Court has taken jurisdiction for the [purpose] of assessing the damages which accrued to shippers and passengers on account of and by reason of said injunction, and has appointed a Special Master to take an account of all amounts accruing to said parties during the time said injunction was in force.

Complainant alleges that the final decree entered in the aforesaid cause on the 11th day of May, 1911, hereinbefore referred to, it was ordered that the bond for injunction filed by the complainant be released and the sureties thereon discharged from further liability, and it is advised and avers that the effect of said order was to relieve complainant of all liability under said bond and preclude any recovery of damages on said bond or by reason of or growing out of the injunctions ordered in the aforesaid cause.

Complainant avers that upon the rendition of the final decree in said cause perpetuating and making the temporary injunction theretofore granted permanent said bonds ceased, by operation of law, to have any effect, and complainant is not liable for any damage that may have accrued to any passenger or shipper on its line of railroad after the rendition of the final decree perpetuating and making the temporary injunction permanent.

Complainant is advised and further alleges that this Honorable Court has jurisdiction to settle and determine all questions relating to complainant's liability and the extent thereof resulting from or growing out of said temporary and permanent injunctions, and having by the order of reference to the Special Master elected
67 to exercise its jurisdiction in that behalf, with the acquiescence and consent of the defendants in said proceedings, it would be unjust and inequitable to allow such a multiplicity of suits as would result from independent actions prosecuted against complainant.

And complainant submits that under the rules and practice prevailing in equity, this Honorable Court will itself proceed to adjudicate all questions relating to the liability of complainant and the sureties on its bond relating to or growing out of the aforesaid proceedings and decree and do complete justice between all parties.

Complainant prays that the said defendants be required to an-

swer the allegations herein contained, but not under oath, same being waived, and that said defendants and all other shippers and passengers who made shipments or who were passengers on the line of complainant's railroad during the time said temporary and permanent injunctions were in force be restrained and enjoined from instituting or prosecuting to judgment any action or actions for the [recover-] of overcharges in transportation of freight or passengers during the time said temporary and permanent injunctions were in force, and for all such other and further relief as may seem meet.

(Signed) MOORE, SMITH & MOORE,
J. M. MOORE,
Solicitors for Complainant.

Endorsed: Filed Jan'y 9th, 1914. Sid. B. Redding, Clerk. By W. P. Feild, Jr., D. C.

(*Record Entry of Filing of Motions by the Defendants, Metcalf and Gallup, to Dismiss Supplemental Bill of Complaint, etc., January* 10, 1914.)

Comes the defendant William J. Metcalf, by Allyn Smith, Esq., his solicitor and files herein his motion to dismiss the supplemental bill of complaint herein; and also comes the defendant Howard H. Gallup, by Allyn H. Smith, Esq., his solicitor and files herein his motion to dismiss and answer.

(*Motion by the Defendant, Metcalf, to Dismiss Supplemental Bill of Complaint.*)

Now comes the defendant, William J. Metcalf, one of the above named defendants and for himself alone says that the complainant ought not to recover, and is not entitled to the relief prayed for in its complaint herein filed against him for that this defend-
68 ant by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true in such manner and form as the same are therein set forth and alleged, this [defendants] moves the Court to dismiss the said bill of complaint, and to the whole and to each and every part thereof, and for cause to dismiss shows that the said complainant has not in and by said bill made or stated any such cause of action as doth or ought to entitle complainant to any relief as thereby sought from and against this defendant.

Wherefore, and for divers other good causes for the dismissal appearing in the said bill, this defendant moves the Court to dismiss the said bill and humbly demands the judgment of this Court whether he shall be compelled to make any further or other answer to the said bill and prays to [*go*] hence dismissed with his costs and charges in this behalf most wrongfully sustained and [*grevi*ously] expended.

(Signed) ALLYN SMITH, *Solicitor.*

STATE OF ARKANSAS,
County of Baxter, ss:

W. J. Metcalf of lawful age and being duly sworn on oath deposes and says that he is the defendant who files the above and foregoing motion; that he knows the contents thereof; and the purposes for which the same is to be used; and that said motion is not interposed for delay, and that he verily believes the same is true in point of fact.

(Signed) W. J. METCALF.

Subscribed and sworn to before me this 31st day of December, 1913.

(Signed) H. F. CLENDENON,
[SEAL.] *Notary Public.*

My Commission expires Oct. 3, 1917.

Endorsed: Filed January 10th, 1914. Sid. B. Redding, Clerk. By W. P. Feild, Jr., D. C.

(*Motion to Dismiss Supplemental Bill of Complaint by and Answer of the Defendant, Gallup.*)

Now comes the defendant, Howard H. Gallup, one of the above named defendants and for his plea, for himself alone says that the complainant, the St. Louis, Iron Mountain and Southern Railway Company, ought not to recover, and is not entitled to the relief prayed for in its complaint herein filed against him, for that this defendant by protestation, not confessing or acknowledging
69 all or any of the matters and things in the said plaintiff's bill to be true in such manner and form as the same are set forth and alleged by the said plaintiff in its said bill, and this defendant for plea says:

1st. That it appears from the said bill of complaint of the relator that this Court has no jurisdiction to hear and determine this action.

2nd. That it appears on the plaintiff's own showing on the face of and by and in the said bill of complaint that the plaintiff is not entitled to the relief prayed for in the said bill against the respondent.

3rd. That it appears by the plaintiff's own showing on the face of said bill of complaint of the relator as set forth in its said bill is wholly without equity.

Answer.

And the said respondent, Howard H. Gallup, now and at all times hereafter, saving for himself all and all manner of benefit of exception or otherwise that can or may be taken to the many errors, uncertainties and imperfections in the said bill contained, for his

answer to the said bill of complaint of the relator, and to so much thereof as this respondent is advised it is necessary and material for him to make answer to for his sole and separate answer to the complaint of the relator says that he admits each and every, all and singular, the truth of the averments and allegations, and each and every and all and singular thereof in the said complaint and bill of the relator contained, and that said averments and allegations are true in substance and fact. But this respondent denies the legal or equitable effect thereof as pleaded by said relator.

And this defendant further says that his action pending in the Baxter Chancery Court was commenced before any action was commenced or pending against him in this Court, and alleges that this Court is without power or authority to enjoin this respondent either by the provisions of the Acts of the Congress of the United States or the usages of the Court of Chancery from proceedings with his said action.

And this defendant further says that his suit in the Baxter Chancery Court is not a suit to recover against the relator on its injunction bond, in the action of the St. Louis, Iron Mountain and Southern Railway Company vs. Robert P. Allen, John W. Crockett and John E. Hampton, constituting the Board of Railroad Commissioners of the State of Arkansas, as against the penalty on the bond but said action is an action to recover, and precedure an accounting
70 by the relator to the respondent for overcharges collected by the relator in violation of the laws of the State of Arkansas from and after the taking effect of the temporary injunction granted in the said action on the 3rd day of September, 1908, up to and including the dissolution thereof on the 18th day of July, 1913, said injunction having been made permanent on the 11th day of May, 1911, but was vacated July 18th, 1913, after the case had been reversed by the Supreme Court of the United States, and the case ordered to be dismissed without prejudice on June 16th, 1913, and this respondent says that the greater amount of said overcharges both for freight and passenger overcharges sued for in his said action were unlawfully collected from him after the said temporary injunction had been made permanent, and between said time, to-wit: May 11th, 1911, and the dissolution thereof on July 18th, 1913.

And this respondent further says that the said injunction Bond given by the relator in the said suit of the said plaintiff vs. Allen, et al., supra, to restrain the passenger and freight rates of the State of Arkansas was as required by the order of this Court in the sum of Two Hundred Thousand Dollars ($200,00.00) and also Eight Hundred Thousand Dollars ($800,000.00) to pay to the State of Arkansas and the defendants in the said action named any damages that may or might have been sustained by the defendants on account or by reason of the granting of the said injunction should it be finally determined that the granting of the said temporary injunction was wrongful. That after the reversal of the decree therein by the Supreme Court of the United States, this Court appointed a Referee [*of*] Master on its own motion, to take an accounting of the said damages, and the said Master has had filed with him against

the said bond and the penalty thereof and the sureties thereon the amount of over One Million Dollars ($1,000,000.00) being largely in excess of the penalty of the bond and in case it should be held that the excess freight and passenger overcharges sought to be recovered in the respondents action in the Baxter Chancery Court are proper charges against the penalty of the said bond (which this respondent denies and protests is not the case) then the said bonds are inadequate and this Court is without the power to satisfy the respondents claim out of the penalty of the bond, and in equity and good conscience this respondent should be permitted to maintain and prosecute his action in a [tribu*b*al] of the County and State of his residence, and this Court ought not, either in equity or good conscience or in law, restrain his so doing.

71 Wherefore this respondent prays that this action against him may be dismissed for want of equity, and that he go hence without day and that he have and recover his costs and disbursements herein most [grev*i*ously] expended.

(Signed) ALLYN SMITH, *Solicitor.*

STATE OF ARKANSAS,
County of Baxter, ss:

Howard H. Gallup, of lawful age and being duly sworn on oath deposes and says that he is the defendant above named, and that he has read the above and foregoing motion and answer; that he knows the contents of the same, and the purposes for which the same is to be used; and that the facts stated therein, are, as he verily believes, true in substance and in fact. And further affiant saith naught.

(Signed) HOWARD H. GALLUP.

Subscribed and sworn to before me this 31st day of December, 1913.

(Signed) H. F. CLENDENON,
[SEAL.] *Notary Public.*

My Commission expires Oct. 3rd. 1917.

Endorsed: Filed Jan'y. 10th, 1914. Sid B. Redding Clerk, by W. P. Feild, Jr., D. C.

(Final Decree on Supplemental Bill of Complaint, etc.)

Be it Remembered, That at a District Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday, the 20th day of October Anno Domini, One Thousand, Nine Hundred and Thirteen at the United States Court Room in the City of Little Rock, Arkansas, the Honorable Jacob Trieber Judge presiding and hold said Court, the following proceedings were had, to-wit: on January 17th, 1914.

No. 1637.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY
vs.
GEORGE W. BELLAMY, WILLIAM F. MCKNIGHT, and J. SAM ROWLAND, Railroad Commissioners of the State of Arkansas, Howard H. Gallup and William J. Metcalf.

Now on this day come the parties to said cause by their respective solicitors, and said cause having, by the consent of all parties, been submitted on final hearing on complainant's supplemental bill, the record and documents referred to therein, the motion to dis-
72 miss and special plea and the answer of the defendant Howard H. Gallup and the motion of the defendant William J. Metcalf to dismiss said bill of complaint, and having been argued by counsel at a former day, and the Court having taken the same under advisement, and being now well and sufficiently advised in the premises doth accordingly order and decree that the defendants Howard H. Gallup and William J. Metcalf, and all other persons, natural or artificial, who were transported on complainant's railroad between stations thereon situated within this State, and all persons who shipped articles or commodities of any kind or character on complainant's said railroad between stations situated in this State, said shipment and transportation of passengers being wholly within the State, during the time the temporary injunction issued under the order of this Court on September 3rd, 1908, and the permanent injunction decreed in said proceeding on final hearing on April 4th, 1911, were in force, that is to say, from the 3rd day of September, 1908, to the 18th day of July, 1913, inclusive, and each of them, their agents, employees, attorneys, and successors, be and they are hereby perpetually enjoined from instituting any action at law or in equity against the complainant in any Court for the recovery of any charge or charges made or collected by complainant of said defendants or either of them, or of any passenger or shipper for the transportation of persons or property on its said railroad between stations in the State of Arkansas, in excess of the rates inhibited by said orders of injunction: that is to say, of the rates for the transportation of freight prescribed by Standard Distance Tariff No. 3 promulgated by the defendants constituting the Railroad Commission of this State, and of two cents per mile for the transportation of passengers prescribed by the Act of the General Assembly of the State approved February 9th, 1907, and promulgated by said Railroad Commissioners during the time said temporary and permanent injunctions were in force.

It is further decreed that the complainant have and recover all its costs in and about this cause expended.

And the Court retains jurisdiction of this cause to make such further orders herein as may be necessary, and in case of the court holding, upon the report of the Special Master in the main case, to which this is ancillary, that the said complainant is not liable on its bonds to any shipper for excess charges, or for other good and

sufficient cause, this decree may be modified or set aside, if the Court deems it necessary to protect the rights of parties.

(Signed) JACOB TRIEBER, *Judge.*

73 (Opinion of the District Court.)

This proceedings arose out of the Arkansas Railroad Rate Cases which have been pending in this Court for some time. The original suit was brought by the Railroad Company against the Railroad Commissioners of the State and two persons who are alleged to be shippers of freight and passengers on the road, as representatives of the shippers and passengers affected by the suit.

The plaintiff now files a supplemental bill as ancillary to the original proceeding, in which it sets out the filing of the original action; that on September 3rd, 1908, upon a hearing, after due notice to the defendants, a temporary injunction was granted by Judge Van Devanter, then one of the Circuit Judges of this Circuit, enjoining the enforcement of the freight tariffs and two cents a mile passenger rate. That order required that the complainant execute a bond to the United States in the penal sum of $200,000.00 conditioned that it would keep a correct account showing the difference between the rate actually charged by complainants after the granting of said injunction and that which would have been charged had the rates inhibited by said order of injunction been applied, and that if it should finally be decided that the order inhibiting the enforcement of the then existing rates should not have been made that the complainants would, within a reasonable time to be fixed by the Court, refund in every instance to the party entitled thereto the excess as charged over what would have been charged had the inhibited rate been charged. In pursuance of this order complainant filed a bond conditioned as therein provided. (The opinion of the Court granting that temporary injunction is reported in 163 Fed. 141.)

On February 18th, 1909, an application was made to the Judge now presiding for a modification of the temporary injunction, and on the 1st day of June, 1909, the temporary injunction formerly granted was modified, and a further order entered requiring complainant to execute an additional bond to the defendants in the sum of $800,000.00 conditioned that complainant should refund to all shippers of freight and passengers the amounts collected in excess of the rates fixed by the laws of the State of Arkansas, if it should be finally determined that the temporary injunction was improperly granted. (168 Fed. 720.) A bond in conformity with this order, and reciting the conditions, was filed on the 5th day of July, 1909. On April 4th, 1911, this Court entered a final decree making the injunction perpetual and releasing the bond for injunction
74 filed in said cause and the sureties thereon from further liability. (187 Fed. 290.) Upon appeal to the Supreme Court the decree of the Circuit Court was reversed and the Court directed to dismiss the bill without prejudice. (230 U. S. 553) On July 18th, 1913, the mandate of the Supreme Court having been

filed, this Court entered an order dismissing complainant's aforesai bill without prejudice and dissolving the temporary and permanen injunctions theretofore granted. It was further ordered, over com plainant's objection, that said cause be referred to a Special Maste appointed by the Court for the purpose of determining the damage sustained by the defendants acting for the benefit of all person shippers, consignees and passengers, who have sustained any dam age by reason of the granting of said injunction. The order directe the Special Master to give notice by publication in a number of new papers in the various counties through which the road ran that a persons having any claims against complainant by reason of th granting of said injunction should present the same to him on c before the 1st day of November, 1913, by filing with him the ev dence, or such proof as might be in their possession, of their claim and directing the Master to make a report of his findings to th Court. Afterwards the time within which such claims were to b filed was extended to January 1st, 1914.

The supplemental bill further charges that the defendant, Hov ard H. Gallup, notwithstanding the aforesaid proceedings and orde of this Court to present the claims to the Special Master, institute an action in the Chancery Court of Baxter County, Arkansas, recover from the Railroad Company the sum of $6,000.00 for charg alleged to have been made by the Railroad Company from the tim the temporary injunction was first granted in 1908 to the time the final dissolution on July 18th, 1913; that W. J. Metcalf, who also made a defendant in this proceedings, and a large number other persons who were passengers or shippers on complainan railroad during the time said order of injunction was in force a threatening to institute similar suits in the various Courts of t State.

It is also charged that a very large number of claims for refun of charges in excess of the inhibited rates during the time said orde of injunction were in force, amounting to more than one-half m lion dollars, have been filed with the Special Master appointed this cause and are now under investigation by said Master, whi proceeding involves a very large amount of expense in the way

Master's costs and expenses; that in [ma-y] instances dup

75 cate claims covering the same shipment have been filed parties severally claiming to be entitled to the alleged cessive charges, and it will be necessary to determine who amo said claimants is entitled to recover any allowance that may made by the Special Master in that behalf; that many claima who were denied the right to recover by the Master are threateni to bring independent suits against complainant for the recovery the claims so presented to and refused by the Master, and co plainant represents that unless an order is issued in this cause joining and restraining proceedings for the recovery of such ov charges during the pendency of the aforesaid proceedings and wh said orders of injunction were in force, many thousands of su will be instituted against complainant by passengers and shipp of freight during the time the injunction was in force; that

complainant would be required to produce its books and records in defending each of the numerous cases brought against it for the purpose of showing the difference between the inhibited rates and those actually charged by it, and will be put to great expense and greatly [harrassed] by being compelled to defend such multitude of suits; that many of the suits so instituted would embrace claims that have already been passed upon by the Special Master appointed in the aforesaid cause, and in many of which allowances have been made to other parties who were adjudged in said proceeding to be entitled to reparation on account of the alleged overcharges, and thereby complainant would be exposed to great loss and damage by reason of double recoveries in favor of different parties upon the same claim or else put to very great expense, trouble and hazard in order to prevent great and irreparable loss and injury by reasons of actions based upon claims presented and allowed by the Special Master under the reference made to him; that the expense involved in such suits as will be instituted against it unless a restraining order is issued will be very great and involve great and serious loss to complainant without regard to the result of said litigation, notwithstanding the fact that this Court has taken jurisdiction for the purpose of assessing the damages which accrued to shippers and passengers on account and by reason of said injunctions.

A Copy of the complaint filed by the defendant Gallup in the Chancery Court of Baxter County, filed as an exhibit to the bill, shows that it is in the nature of a bill of discovery, it being alleged that the plaintiff Gallup cannot state the exact amount of such excess charges, and therefore prays for an accounting and a
76 discovery of the amount of such payments.

The prayer of the supplemental bill is that these defendants, and all other persons having claims of that nature, be enjoined from instituting or prosecuting to judgment any action or actions for the recovery of such overcharges.

The order or reference to the Special Master directs him, among other things, to report separately all claims which arose under the first temporary injunction granted by Judge Van Devanter; next, all claims which arose under the bond executed in pursuance of the order made by the Court on June 1, 1909, and next, all cases which arose after the final decree making the injunction permanent was rendered on April 4, 1911 until the dissolution of the injunction and the dismissal of the bill.

The defendant Gallup filed a motion to dismiss upon the ground that the complainant was not entitled to any relief upon the facts stated in the supplemental bill, and also filed a plea setting up the fact that his suit in the Chancery Court of Baxter County had been instituted prior to the filing of the supplemental bill, and an answer admitting all the allegations set up in the supplemental bill.

The defendant Metcalf only filed a motion to dismiss the supplemental bill upon the ground that it does not state facts which entitle the complainant to relief.

A temporary restraining order was granted and the cases have now been heard upon the pleadings and the motions to dismiss, the

question before the Court being whether the injunctions should be made perpetual.

Among the rules of the Circuit and District Courts of this Circuit is the following promulgated on November 7, 1900, by the Judges then composing the Circuit Court.

"In all cases in which an injunction has been granted, and a bond executed by the complainants, damages sustained by the party enjoined, in case the injunction is dissolved, may be assessed in the same proceeding, either by the Court or by reference to a Master, and judgment entered in the same action against the sureties on the bond; provided, however, that unless the damages are thus assessed in the cause, or a judgment entered that the party enjoined is entitled to no damages by reason of the improper granting of the injunction, he may proceed on the bond in an action at law
77 without any further order or leave of the Court."

MOORE, SMITH AND MOORE,
Of Little Rock, Ark., for the Complainant.
ALLYN SMITH,
Of Cotter, Ark., for the Defendants Gallup and Metcalf.
MORRIS M. COHN,
COCKRILL AND ARMISTEAD,
ROSE, HEMINGWAY, CANTRELL AND LOUGHBOROUGH,
All of Little Rock, Ark., as Amicus Curiae Representing Other Shippers Not Parties to This Bill
JOSEPH M. HILL,
Of Fort Smith, Ark., for the Railroad Commissioners.

TRIEBER, *D. J.:*

The argument of the numerous counsel took a very wide range and a great many questions were discussed. Among others were the liability on the bonds; the liability of the railroad company regardless of the Bond before the final decree making the injunction perpetual was rendered by this court; the liability of the railroad company on the bonds, as well as individually, for the excess rates collected after the injunction had been made perpetual by this Court, and up to the time it was dissolved and the bill dismissed in obedience to the mandate of the Supreme Court. As these questions will have to be determined when the report of the Special Master up for hearing the Court deems it unnecessary to determine them in this proceeding. The only question properly before the Court is whether this supplemental bill can be maintained as an ancillary proceeding to the original bill, and if so whether it is the duty of the Court, in order to prevent the many thousands of suits which might be instituted in the different courts of the State to recover these overcharges, to enjoin the parties having these claims and determine the entire matter in the proceeding now pending in this Court to ascertain the liability of the railroad company for the wrongful injunction.

It is claimed that the suit of the defendant Gallup having been

instituted in the Chancery Court of Baxter County before the
78 filing of this bill no injunction can be issued by this Court to stay that action, as that is expressly prohibited by section 720 Rev. Stat. That section does not apply to a proceeding which is ancillary to a cause of which the Court had original jurisdiction. As stated in Gunter vs. Atlantic Coast Line, 200 U. S. 273, 292.

"The proposition that the Eleventh Amendment or Section 720 of the Revised Statutes controls a Court of the United States in administering relief, although the Court was acting in a matter ancillary to a decree rendered in a cause over which it had jurisdiction, is not open for discussion". Citing Deitzsch vs. Huidekoper, 103 U. S. 494; Prout vs. Starr, 188 U. S. 537; Julian vs. Central Trust Co., 193 U. S. 93, 112. To these cases may be added Root vs. Woolworth, 150 U. S. 401; Lang vs. Choctaw, etc. R. R. Co. 160 Fed. 355, 87 C. C. A. 307; Mound City vs. Castleman, 187 Fed. 921, 110 C. C. A. 55.

In Root vs. Woolworth the supplemental bill was filed several years after a decree in the original cause had been rendered establishing the title of the grantor of the plaintiff in the supplemental bill. The jurisdiction of the Court to grant such relief was attacked upon several grounds by the defendant, one of them being that there was no diversity of citizenship between the plaintiff and the defendant in the ancillary proceedings, but the court held:

"The bill being ancillary to the original proceedings of Morton vs. Root, and supplemental to the decree rendered therein, can be maintained without reference to the citizenship or residence of the parties. There is, consequently, no force to the objection that the Court below had no jurisdiction in this cause because the appellee and appellant were both citizens of Nebraska."

Another objection was that the [proc-dings] should have been an action of ejectment on the law side of the Court. The Court in overruling that objection held:

"If the bill in the [pr-sent] case could be properly considered as an ejectment bill, the objection taken thereto by the defendant would be fatal to the proceeding; but, instead of being a bill of this character it is clearly a supplemental and ancillary bill, such as the court has jurisdiction to entertain * * * * * It is well settled that a Court of equity has jurisdiction to carry into effect its own orders, decrees and judgments which remain unreversed when the subject matter and the parties are the same in both proceedings."

79 The Court, after quoting Section 338 of Story's Equity Pleading, proceeded:

"The jurisdiction of courts of equity to entertain and effectuate their own decrees by injunctions or writs of assistance in order to avoid the re-litigation of questions once settled between the same parties is well settled."

Nor is it necessary that the parties be the same. "It is equally clear" the court in that case held, "that his assignee or privy in estate has the right to the same relief that Morton (the original party, and Wooldorth's grantor) could have asserted." Quoting

as authority for this rule of law Section 429, Story's Equity Pleading.

Upon the same principle it has also been held that if a state court refuses to grant a petition for removal to a federal court, when the petition and bond show that the cause is one properly removable, and a transcript of the record has been filed in the national court to which it was sought to have it removed, that court may be a proceeding ancillary in its nature grant an injunction restraining the plaintiff from proceeding with his cause in the state court without violating Section 720 Rev. Stat. French vs. Hay 22 Wall. 250; Traction Co. vs. St. Bernard Mining Co., 196 U. S. 239, 245.

For these reasons if the court has jurisdiction to maintain this ancillary proceeding, the fact that the defendant Gallup had, before the filing of this supplemental bill, instituted his action in the State Court would not prevent this court from enjoining him from prosecuting that action by reason of the provisions of Section 720 Rev. Stat.

Has the court jurisdiction to entertain the supplemental bill?

As this is an ancillary proceeding, the jurisdiction of the court depends upon the jurisdiction of the original cause, regardless of the fact that it would have no jurisdiction [*is*] this were an original proceeding.

In Riggs vs. Johnson County, 6 Wall, 166, 187, it was held that

"Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purpose for 80 which it was conferred by the constitution."

In Lamb vs. Ewing, 54 Fed. 269, 4 C. C. A. 320, the Circuit Court of Appeals for this Circuit held:

"The rule is well settled that where a court rightfully takes jurisdiction over the parties and the subject matter of a controversy, it has the right not only to render judgment in the first instance, but also to secure to the prevailing party the fruits of such judgment and the original jurisdiction is a continuing one for that purpose and as corollaries to the general rule it is also equally well settled that [w-ere] third parties have rights in or claims to property taken into the possession of the court under process issued against the original parties, such third parties may intervene in the proceeding for the protection of their rights; and, further, that where the process of the court if wrongfully and illegally used to the injury of a third party, the latter may appeal to the court for proper redress. If the federal courts were deprived of the power to protect third parties against injury resulting from the enforcement of process issuing from such courts by reason of the citizenship of the injured party, or because the amount of the injury was less than $2,000.00, it would work a great hardship upon the individual citizen and be a most serious blot upon the system of federal jurisprudence. The power of the courts of the United States in these particulars is as ample as that of the courts of the state, and the technical question of jurisdiction is solved by the ruling that in all ancillary or auxiliary proceedings for the enforcement of judg

ments rendered, and in proceedings for the protection of the rights of third parties, the jurisdiction is supported by that of the original action or suit."

See also to the same effect of Reilly vs. Golding, 10 Wall. 56, Cooke vs. Avery, 147 U. S. 375, 390; Camp vs. Boyd, 229 U. S. 530, 551, 552; Tylor Mining Co. vs. Last Chance Mining Co., 90 Fed. 15, 32 C. C. A. 498; Lea vs. Deakin (C. C.) 13 Fed. 574; Coosaw Mining Co. vs. Farmer's Mining Co. (C. C.) 51 Fed. 107; Redlich Mfg. Co. vs. John H. Rice & Co., (C. C.) 203 Fed. 722; Files vs. Davis 118 Fed. 465.

In Russell vs. Farley, 105 U. S. 433, 445, a leading case on this subject, it was held, Mr. Justice Bradley delivering the opinion of the court, that the right of the court to settle the liability of the parties in an injunction proceeding was inherent in every court of chancery, and does not depend on any provisions of the
81 bond or on the [existance] of an express law or rule of Court.

One of the principal questions involved in this proceding is the construction of the effect of the final decree rendered in the main case.

In Tullock vs. Mulvane, 184 U. S. 497, 504, it was held that an action on an injunction bond given in a cause pending in a court of the United States raises a federal question, and therefore a judgment of the highest court of the state on such a bond is subject to review on error by the Supreme Court. In that case the opinion was delivered by Mr. Justice, now Mr. Chief Justice White, and it was held:

"It is settled that such court (meaning the national court in which the injunction bond had been given) has the inherent right to set the bond aside and to determine in its discretion whether a recovery could be had upon it." Citing Russell vs. Farley, supra.

A similar conclusion was reached in M. K. & T. Ry. Co. vs. Elliott, 184, U. S. 534, which was on error to the highest court of the State of Missouri, and National Foundry &c. Co. vs. Oconto Water Supply Co., 183 U. S. 216, 233; and Leslie vs. Brown 90 Fed. 171, 32 C. C. A. 556 an original proceeding in a national court.

This court having taken jurisdiction for the purpose of determining the question of damages growing out of the injunction clearly has the exclusive right and authority to adjudicate and pass upon all questions in*p*olved in that inquiry; and especially is this true in a case like the one at bar where there are probably fifty thousand claims for overcharges, all arising out of the injunction granted by this Court in the original cause. To prevent such a multiplicity of suits would be sufficient to justify a court of equity to maintain jurisdiction of an ancillary proceeding in which all these matters can be determined in one reference. Concurring opinion of Mr. Justice Miller in Chicago, etc. Ry. Co. vs. Minnesota, 134 U. S. 418, 460, approved in Ex Parte Young, 209 U. S. 123, 166.

It is further contended that — the bond for $200,000.00 the United States is the sole obligee, and in the second bond for $800,000.00 the Railroad Commissioners of the State of Arkansas and the two

other defendants named as representatives of the shippers
82 as a class were the only obligees, and for that reason, the defendants in the supplemental bill, not having been parties to the record in the original proceeding have no standing in that case and are, therefore, [remidiless] so far as there is a liability on the bonds. Therefore, it is claimed that this court is without jurisdiction to maintain an ancillary bill against shippers not parties to the bonds and their only remedy is by independent action against the railroads.

Even if it were true that the bonds were only the ordinary injunction bonds "to pay the defendants all damages they may sustain by reason of the granting of the injunction, if upon final hearing it should be determined that the injunction was improperly granted," this contention of the defendants Gallup and Metcalf could not be sustained. In an action of this nature, against public officers who by law fix carriers' rates, shippers and passengers are quasi parties to the suit. Southern Ry. Co. vs. Railroad Com. of Alabama, 196 Fed. 558, 561. The Railroad Commissioners are not acting for themselves in this proceeding nor for the state as a state, for neither could be benefited or injured pecuniarily no matter what the result of the litigation may be. Their only interest is that of the State in a governmental sense. They merely act as trustees for the shippers and passengers on these roads, and represent them in the same manner as the trustee of a railroad mortgage represents the holders of the bonds secured by the mortgage. Reagan vs. Farmers Loan & Trust Co., 154 U. S. 362, 390; Missouri etc. Ry. Co. vs. Missouri Board of Com. 183 U. S. 53, 60.

In the last cited case it was said:

"It is not an action to recover any money from the state. Its results will not inure to the benefit of the state as a state in any degree. * * * The parties interested are the railway company, on the one hand, and they who use the bridge, on the other, the one interested to have the charges maintained as they have been, the other to have been reduced in compliance with the order of the Commission * * * It is true that a state has a governmental interest in the welfare of all its citizens in compelling obedience to the legal orders of all its officials, and in securing compliance with all its laws. But such general governmental interest is not that which makes the state, as an organized political community, a party in interest in the litigation. * * * The interest must be one in the state as an artificial person."

83 But, aside from this, each of the bonds in this case expressly provide that it is for the benefit of all shippers and passengers. The conditions in the first bond are:

"If it should eventually be decided that so much of this order as inhibits the enforcement of existing rates should not have been made, the said complainant shall, within a reasonable time to be fixed by the Court, refund in every instance to the party entitled thereto the excess it charged over what would have been charged had the inhibited rates been applied."

And in the other bond the condition is:

"If it should eventually be decided that so much of this order as inhibits enforcement of the rates prescribed * * * that the complainant shall refund to the owners and holders of the certificates issued by it (showing the excess payments) the excess charges as shown by the same."

It will thus be seen that when the temporary injunction was granted by the Court it reserved to itself the right to require the railroad and the sureties on its bonds to "refuse in each instance to the party entitled thereto" the monies collected in excess of the enjoined rates as directed by the Court. The orders of the court and the bonds given in pursuance thereof are just as much for the benefit of every shipper and passenger as those who were made parties defendants to the suit as representatives of all shippers and passengers. To have made all shippers and passengers parties to the original action would, of course, have been, if not impossible at least impracticable, for it would have necessitated making every inhabitant of the state, and even non-residents, parties defendant. To avoid this, and by authority of the Equity Rule 48 then in force, the bill made two shippers and passengers defendants as representatives of all other shippers and passengers. In West vs. Randall, 2 Mason, 181, Fed. Case 17, 424, it was held by Mr. Justice Story that even in the absence of such a rule that course would be a proper one.

Equity Rule 10, then in force, provided:

"Every person not being a party in any cause who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause." And it has been held that bidders or purchasers at a foreclosure sale, although not parties to
84 the suit, are entitled to appeal as to matters affecting them. Blossom vs. Milwaukee &c. R. R. Co., 1 Wall. 655; Kneeland vs. American L. & T. Co., 136 U. S. 89.

In re Farmers' [Loan*d*] & Trust Co., 129 U. S. 206, 213, Mr. Justice Miller said:

"But the doctrine that, after a decree which disposes of a principal subject of litigation and settles the rights of the parties in regard to that matter, there may subsequently arise important matters requiring the judicial action of the court in relation to the same property and some of the same rights litigated in the main suit, making necessary substantative and important orders and decrees in which the most material rights of the parties may be passed upon by the court, and which where they partake of the nature of final decisions of those rights may be appealed from, is well settled by the decisions of this court."

In that case a mandamus was granted to the judges of the circuit court to grant an appeal from an order made after final decree, and while the cause was pending on appeal in the Supreme Court.

Suppose the court when it granted the temporary injunction, had required the railroad company to deposit in the registry of the court all the excess charges, to be there impounded until the final determination of the cause. Can there be any doubt of the power

of the court in that case to have enjoined shippers from maintaining independent suits in other courts for the recovery of such excess charges? When the court instead of requiring such deposits exacted a bond to do the same thing, why does not the bond take the place of the money, and authorize the court to do what it would have done if the money were in the registry? This objection must, therefore, be overruled. On the part of some of the shippers counsel concede that the court would have the right to retain jurisdiction of ancillary proceedings, but insist that the injunction be granted only upon condition that complainant will not contest its liability but only the amounts claimed. There can be no doubt that the court in granting an injunction has the power to impose reasonable conditions, as the writ of injunction is not a writ of right but one of discretion; but that does not mean an arbitrary discretion, dependent solely on the whim of the chancellor. It means a sound, judicial discretion, informed and directed by the established principles, rules and practice of equity jurisprudence.

This question was fully discussed in the opinion filed in this
85 case in 168 Fed. 720 where many authorities are cited. To grant an injunction upon such conditions that, the party asking it, waive its defense and concede its liability when that liability is one of the main questions at issue, would be a travesty on justice, and as much of a deprivation of its property without due process of law as was the act condemned in Hovey vs. Elliott, 167 U. S. 409. Of what benefit is the injunction to the complainant if at the same time it must, in effect, pledge itself to confess judgment?

If the defendants had suggested to the court that there is some doubt as to the solvency of the complainant or its ability to pay any decree that may be finally rendered against it, the court would no doubt require a bond conditioned that it would satisfy any decree which may be finally rendered against it, but no such demand or suggestion was made.

The object of this ancillary proceeding is to determine whether the plaintiff is liable, and if so, to whom and for what sums. The jurisdiction might also be maintained upon the ground that when a court of equity once obtains jurisdiction it has the right to retain it for the purpose of settling all matters arising by reason of the litigation. Dewing vs. Perdicaries, 96 U. S. 193; Ghormley vs. Clerk, 134 U. S. 338; United States vs. Union Pacific R. R. Co., 160 U. S. 1; Hopkins vs. Grimshaw, 165 U. S. 342.

The decisions of the Supreme Court in re City of Louisville and In re John Engelhard & Sons Co., opinions filed January 5, 1914, and just to hand, are very much in point and, in the opinion of this court, sustain the conclusions reached herein.

The court fully realizes that the question of jurisdiction of a national court in causes of this nature is always a delicate one. But, as stated by Chief Justice Marshall in Cohens vs. Virginia, 6 Wheat. 264, 404:

"It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a

measure because it approaches the confines of the constitution. * * * We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously perform our duty.

86 Quoted and followed in Ex parte Young, supra.

As the parties [agrees] in open court that a final decree may be entered, the defendants declining to plead further, a perpetual injunction is granted, restraining these defendants and all other persons similarly situated from instituting or maintaining any suits for excess charges collected by the complainant during the pendency of this injunction.

Endorsed: Filed January 17th, 1914. Sid B. Redding, Clerk, by W. P. Feild, Jr., D. C.

(*Record Entry of Filing of Petition for Appeal and Assignment of Errors, etc., July* 2, 1914.)

Now on this day come the defendants, William J. Metcalf and Howard H. Gallup, by Allyn Smith, Esq., their solicitor, and pray an appeal from the decree granting a perpetual injunction as to them herein, to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, and file their Assignment of Errors; also their bond for costs in the penal sum of Five Hundred Dollars ($500.00), as directed by the Court, with satisfactory security, which bond is thereupon approved as sufficient; and said defendants file herein their Citation with service of the same duly acknowledged by J. M. Moore, Esq., solicitor for the complainant herein.

(*Petition for Appeal, Assignment of Errors, and Order Allowing Appeal.*)

Come the defendants, William J. Metcalf and Howard H. Gallup, and pray an appeal from the decree of the Court entered on January 17th, 1914, to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, for the correction of the following errors, which they aver have been committed by the District Court herein:

1. The said Court erred in holding that it had jurisdiction to entertain the supplemental bill of complaint filed herein by the St. Louis, Iron Mountain and Southern Railway Company.

2. The Court erred in entering the decree granting a perpetual injunction as to said two defendants, and each of them herein.

3. The said Court erred in rendering said decree granting a perpetual injunction, because the effect of such decree is to deprive them and each of them of their property without due process of law.

87 4. And the said defendants, and each of them aver that in the entry of the injunctive orders by the said Court on Sep-

tember 3rd, 1908, and subsequently, and by its decree of Januar
17th, 1914, the Court has undertaken to bind said defendants, an
each of them, when neither of them was a party to the suit, and ha
not been made a party defendant therein nor served with proce
therein, prior to the entry of the order dismissing the said suit
the direction of the Supreme Court of the United States; and tha
the effect of said decree of January 17th, 1914, is to deprive the sai
defendants, and each of them, of their property without due proce
of law.

5. The Court erred in holding that because injunction bon
taken in the original cause covered by the liability of the said Rai
way Company to the actual defendants in the said original suit, pri
to the entry of the dismissal of the bill of complaint herein, sai
bonds likewise fixed the liability and the tribunal to which said d
fendants, and each of them, could have recourse for their sever
claims, and disentitled them, and each of them, to resort to a Sta
Tribunal to enforce said claims.

6. The said Court erred in holding that the doctrine of res a
judicata applied to these defendants, or to either of them, in suc
sense that said defendants could not sue upon their several clain
against the said St. Louis, Iron Mountain and Southern Railwa
Company, in any tribunal which they, or either of them, selecte

7. The said Court erred in ruling that these defendants, and eac
of them, have no other remedy than that of pursuing the said [in
junctions] bonds filed by said St. Louis, Iron Mountain and Soutl
ern Railway Company herein, notwithstanding they were not pa
ties to the record.

8. The said Court erred in holding that the said St. Louis, Iro
Mountain and Southern Railway Company could relitigate the que
tion as to whether the tariff fixed by the Railroad Commission of th
State of Arkansas and alluded to in the original complaint filed i
this cause was, or was not confiscatory before the Master appointe
to pass on claims for overcharges under the orders of said Distri
Court; because the said ruling disregards the decree of the Supren
Court of the United States rendered in said cause.

9. The said Court erred in assuming that the injunction bon
executed by the said Railway Company could constitute the bas
of an order of reference on the motion and at the instance
88 the Court, not had on the petition or at the instance of an
party to the record.

10. The Court erred in holding that it had an ancillary jurisdi
tion over these defendants, or either of them.

Wherefore, the said defendants, and each of them, pray an a
peal to the said Circuit Court of Appeals for the Eighth Judici
Circuit; and they herewith present their bond in the sum fixed b
the Court for the costs of said appeal.

(Signed) ALLYN SMITH,
Solicitor for said Defendants

Endorsed: Appeal allowed, returnable in sixty days, upon exec
tion of a cost bond in the sum of Five Hundred Dollars.

(Signed) JACOB TRIEBER, *Judge.*

Endorsed: Filed July 2nd, 1914. Sid. B. Redding, Clerk, By W. P. Field, Jr., D. C.

(*Bond on Appeal.*)

Know All Men By These Presents, That we, William J. Metcalf and Howard H. Gallup, as principals, and Clarence E. Pond, as surety, are held and firmly bound unto the St. Louis, Iron Mountain and Southern Railway Company, and to all other parties in interest, in the penal sum of Five Hundred Dollars ($500.00), to be paid to the said St. Louis, Iron Mountain and Southern Railway Company, its successors or assigns, and to any other party in interest. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 1st day of July, A. D. 1914.

Whereas, the above named William J. Metcalf and Howard H. Gallup, have prosecuted their appeal from the decree of the District Court of the United States for the Western Division of the Eastern District of Arkansas, to the Circuit Court of Appeals for the Eighth Circuit, to reverse the decree rendered in the above entitled cause by the said District Court.

Now, Therefore, the condition of this obligation is such, that if the above named William J. Metcalf and Howard H. Gallup, and each of them, shall prosecute their said appeal to effect and answer all costs, if they, or either of them fail to make good their
89 pleas, then this obligation shall be void, otherwise to remain in full force and virtue.

Sealed and delivered in the presence of:

(Signed) HOWARD H. GALLUP,
WILLIAM J. METCALF,
[SEAL.] By ALLYN SMITH,
Their Attorney.
CLARENCE E. POND.

UNITED STATES OF AMERICA,
Eastern District of Arkansas, ss:

Howard H. Gallup and Clarence E. Pond, being duly sworn, depose and say, and each for himself saith, that he is worth the sum of Five Hundred ($500.00), over and above all his just debts and liabilities.

(Signed) HOWARD H. GALLUP.
CLARANCE E. POND.

Subscribed and sworn to before me this 1st day of July, 1914.

(Signed) H. F. CLENDENON,
[SEAL.] *Notary Public.*

My Commission expires Oct. 3rd. 1917.

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Endorsed: I approve the above bond and the sufficiency of the sureties thereon.
(Signed) JACOB TRIEBER, *Judge.*

(*Citation.*)

The United States of America, to St. Louis, Iron Mountain and Southern Railway Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an appeal, filed in the Clerk's office of the District Court of the United States for the Western Division of the Eastern District of Arkansas, wherein George W. Bellamy, William F. McKnight and J. Sam Rowland, as Railroad Commissioners of the State of Arkansas, and Howard H. Gallup and William J. Metcalf, [a] are appellants, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellants, as in said appeal mentioned, should not be cor-
90 rected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Jacob Trieber, Judge of the Circuit Court of the United States for the Eastern District of Arkansas, this 2nd day of July in the year of our Lord one thousand nine hunded and Fourteen.

JACOB TRIEBER,
United States District Judge, for the Eastern District of Arkansas.

Service of the above Citation acknowledged this 2nd day of July, 1914.

J. M. MOORE,
[*Attorneys*] *for Plaintiff.*

Endorsed: Filed July 2nd. 1914. Sid B. Redding, Clerk.

(*Clerk's Certificate to Transcript.*)

I, Sid. B. Redding, Clerk of the District Court of the United State for the Eastern District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing writing annexed to this certificate are true correct and compared copies of the original remaining of record in my office, at Little Rock, Arkansas, of the Assignment of Errors, and of all pleadings, record entries and decrees on the supplemental bil filed by the St. Louis, Iron Mountain Railway Company against William J. Metcalf, Howard H. Gallup, and William F. McKnight George W. Bellamy, and J. Sam Rowland, as Railroad Commissioners of the State of Arkansas, as per the præcipe on file and o record in said cause.

In Witness Whereof, I have hereunto set my hand and the seal of said Court, this 27th day of July in the year of our Lord, One Thousand Nine Hundred and Fourteen and of the Independence of the United States of America, the One Hundred and Thirty-ninth.

[Seal U. S. Dist. Court, Western Division, Eastern District of Arkansas.]

SID B. REDDING, *Clerk.*

Attest:
Filed Jul- 29 1914.
JOHN D. JORDAN,
Clerk.

91 And thereafter the following proceedings were had in the Circuit Court of Appeals, in said cause, viz:

(*Appearance of Messrs. Rose, Hemingway, Cantrell & Loughborough, as Counsel for Appellants.*)

United States Circuit Court of Appeals, Eighth District.

No. 4284.

GEORGE W. BELLAMY et al., Appellants,
vs.
ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

The Clerk will enter my appearance as Counsel for the Appellants.

W. E. HEMINGWAY, Little Rock, Ark.
G. B. ROSE, " " "
D. H. CANTRELL, " " "
J. F. LOUGHBOROUGH, " " "

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jul. 31, 1914.

(*Appearance of Counsel for Appellee.*)

The Clerk will enter my appearance as Counsel for the Appellee.

J. M. MOORE,
W. B. SMITH,
J. MERRICK MOORE.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 23, 1914.

(*Appearance of Mr. Allyn Smith, as Counsel for Appellants.*)

The Clerk will enter my appearance as Counsel for the Appellants.

ALLYN SMITH.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 11, 1915.

92 (*Order of Submission.*)

December Term, 1914.

Thursday, January 14, 1915.

This cause having been called for hearing in its regular order, and counsel not appearing to present oral argument for either of the parties, this cause was thereupon, taken by the Court as submitted on the transcript of record from said District Court and the briefs of counsel filed herein.

(*Motion to Withdraw Certain Names Noted as Counsel for Appellants.*)

Come the undersigned, who have heretofore been noted as counsel for appellant in the above entitled cause, and explain that Attorney Allyn Smith at Cotter, Arkansas, is the attorney for the appellants herein, and requested the undersigned to appear as counsel for appellant and to assist him in perfecting his appeal and the preparation of the first brief prepared herein; but as he resides at Cotter, Arkansas, and the undersigned reside at Little Rock, Arkansas, it would be more convenient for him if he is noted as the attorney of record for the appellants herein and the appearance of the undersigned in that capacity be withdrawn.

Wherefore the undersigned respectfully pray that their names be withdrawn as counsel for the appellants herein.

W. E. HEMINGWAY.
G. B. ROSE.
D. H. CANTRELL.
J. F. LOUGHBOROUGH.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 15, 1915.

93 (*Order Granting Leave to Withdraw Certain Names Noted as Counsel for Appellants.*)

December Term, 1914.

Monday, January 18, 1915.

This cause having been called to the attention of the Court, came on to be heard upon the application of the individual members of

the firm of Rose, Hemingway, Cantrell and Loughborough for leave to withdraw their appearance as counsel for appellants.

On consideration whereof, and in pursuance of said application, it is ordered that the same be, and is hereby, granted; thereupon, the appearance as counsel for appellants by Mr. W. E. Hemingway, Mr. George B. Rose, Mr. D. H. Cantrell and Mr. J. F. Loughborough is accordingly withdrawn

94 (*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1914.

No. 4284.

GEORGE W. BELLAMY et al., Appellants,
vs.
ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Appellee.

Appeal from the District Court of the United States for the Eastern District of Arkansas.

Mr. Allyn Smith and Mr. J. F. Loughborough, were on the brief, for appellants Gallup and Metcalf.

Mr. J. M. Moore, Mr. W. B. Smith and Mr. J. Merrick Moore, were on the brief, for the appellee.

Before Adams and Carland, Circuit Judges, and Amidon, District Judge.

AMIDON, *District Judge*, delivered the opinion of the Court:

The present appeal presents a subordinate matter arising out of the Arkansas Rate Cases, 187 Fed., 290, 230 U. S., 553. A schedule of freight and passenger rates was prescribed under the authority of that state. The St. Louis, Iron Mountain & Southern Railway Company filed in the federal court, its bill against the Railroad Commissioners and individual defendants as passengers and shippers, charging that the rates were confiscatory. A preliminary injunction was issued, restraining the deefndants and the public generally from instituting any processing against the carrier on account of its charging rates in excess of those fixed by law or the commissioners. For the protection of passengers and shippers, the order required
95 the complainant to give a bond to the United States in the sum of $200,000 "conditioned that said complainant shall keep a correct account showing as respects the carriage of passengers and freight the difference between the tariff actually charged, and that which would have been charged had the rates inhibited hereby been applied, showing the particular carriage in question, and the stations between which the same occurred, and the name of the per-

son affected, so far as may be practicable, which record shall be made and kept subject to the further order of this court; and further conditioned that if it shall eventually be decided that so much of this order as inhibits the enforcement of the existing rates should not have been made, that said complainant shall, within a reasonable time, to be fixed by the court, refund in every instance to the party entitled thereto, the excess in charge over what would have been charged had the inhibited rate been applied, together with lawful interest and damages." A bond thus conditioned was given. Subsequently an additional bond in the penal sum of $800,000 was required and given. At the final hearing of the cause, a perpetual injunction was granted, and further liability under the bonds was released. On appeal the Supreme Court reversed this decision, and directed that the bill be dismissed without prejudice. The trial court in intering judgment upon the mandate of the Supreme Court not only entered a judgment in conformity with its provisions, but proceeded in the same decree to enter judgment appointing a special master "for the purpose of determining the damges sustained by the defendants by reason of the granting of the temporary and permanent injunction."

Before the making of this order the defendant, Metcalf, had instituted a suit in the state chancery court to recover $6,000 excessive freight charges exacted of him by the Railway Company while the primary suit was pending. This action was based not on the bond, but on the statutory liability arising out of the exaction of the excessive rates.

Soon after the trial court made its order appointing the master, the Railway Company filed a supplemental bill, setting forth that a large number of claims existed against it by reason of the excessive rates collected during the pendency of the litigation; that many actions were threatened in the state courts for the enforcement of these claims; that conflicting claims were made in respect of the same shipment, and that complainant would be subject to a
96 multiplicity of suits, and great damage and expense, unless the court should take exclusive jurisdiction of these claims, and restrain independent actions for their collection. Metcalf was made a party to this supplemental bill, and the other defendant, Gallup, we also made a party, with an averment that he was about to institute an independent suit. The bill further alleged that the parties were so numerous as to make it impractical to bring all of them before the court, and asked that Metcalf and Gallup be treated as representatives of the class. These defendants appeared and challenged the jurisdiction of the court and the equity of the bill, both by motion to dismiss and answer. A hearing was had, and the court rendered its decision as follows: "A perpetual injunction is granted restraining these defendants, and all other persons similarly situated, from instituting or maintaining any suits for excess charges collected by the complainant during the pendency of this injunctions." The defendants, Metcalf and Gallup, appeal from that order.

The order is too broad. The court had jurisdiction of all liabilities arising out of the bonds made pursuant to its orders. It

could appoint a master before whom all claims based on those bonds should be heard, and restrain actions in other jurisdictions to collect such claims. The bonds were judicial. The orders requiring them to be given, retained the jurisdiction of the court to ascertain and enforce liabilities arising under them. That power probably existed independently of such reservation. Russell v. Farley, 105 U. S., 433; In re Louisville, 231 U. S., 639; In re Engelhard, 231 U. S. 646; Louisville v. Cumberland Telephone Co., 231 U. S., 652. This, however, was the measure of the court's jurisdiction. Parties from whom excessive rates had been exacted, were not confined to suing on the bonds. They also had the right given them by law to recover the overcharges. That right was not destroyed by the injunction, but was simply suspended. As soon as the injunction was out of the way, the right and remedy for its enforcement stood the same as if the injunction had never been issued.

Neither can the order be sustained on the ground of preventing multiplicity of suits. The rights of each shipper or passenger, in case he relies not on the bond but on the statute, arise out of an independent contract, and there is no community of right or interest such as is necessary to support jurisdiction in equity for the purpose of preventing a multiplicity of suits. Hale v. Allison, 188
97 U. S., 56, 72, et seq; United States v. Bitter Root Development Company, 200 U. S., 451.

The order of the trial court is modified so as to restrain only such actions as are brought on one or both of the bonds, and as so modified is Affirmed.

Appellants will recover their costs.

Filed March 8, 1915.

98 (*Decree.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1914.

No. 4284.

Monday, March 8, 1915.

GEORGE W. BELLAMY, WILLIAM F. MCKNIGHT, and J. SAM ROWLAND, as Railroad Commissioners of the State of Arkansas, and Howard H. Gallup and William J. Metcalf, Appellants,

vs.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

Appeal from the District Court of the United States for the Eastern District of Arkansas.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Arkansas, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and

decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, modified so as to restrain only such actions as are brought on one or both of the bonds, and as thus modified that the order and decree of the said District Court, in this cause, be, and the same is hereby, affirmed at the costs of the appellee; and that George W. Bellamy, William F. McKnight and J. Sam Rowland, as Railroad Commissioners of the State of Arkansas, and Howard Gallup and William J. Metcalf, have and recover against the St. Louis, Iron Mountain and Southern Railway Company the sum of — Dollars for their costs in this behalf expended and have execution therefor.

March 8, 1915.

99 In the United States Circuit of Appeals, Eighth Circuit.

No. 4284.

GEORGE W. BELLAMY et al., Appellants,

vs.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Appellee.

Petition for Rehearing.

Petition of appellee, in which it respectfully shows that it is advised and verily believes that there are good and sufficient reasons why the above entitled cause should be reheard and the opinion of the district court affirmed.

And in that behalf petitioner respectfully submits that the conclusions of this honorable court that the order entered by the district court in said cause was too broad; that parties from whom excessive rates had been collected were not confined to suing on the injunction bond, but could severally maintain separate actions in independent jurisdictions were based on error of law.

100 I.

At page 2 of the opinion, the court say:

"This action was based not on the bond, but on the statutory liability arising out of the exaction of the excessive rates."

Again, at page 3:

"Parties from whom excessive rates had been exacted, were not confined to suing on the bond. They also have the right given by the law to recover the overcharges."

The only statutes of the State of Arkansas permitting action for overcharges to be brought are sections 6620 and 6813 of Kirby's Digest. Section 6620 imposes a penalty of not less than $50, nor more than $300, and an attorney's fee, for charging more than two cents a mile for passengers. Section 6813 imposes a penalty of not less than $500, nor more than $3,000 for violating the tariff of

freight charges fixed by the commission. There is no provision in the statutes of Arkansas for a review of rates fixed either by the Legislature or the commission. Under these circumstances it is now well settled by the decision of the Supreme Court of the United States that until a test has been made or an opportunity for a test afforded, such penalties are unconstitutional. At the present term of the Supreme Court, this question was fully discussed and the former authorities reviewed in Wadley Southern Ry. v. Georgia, 235 U. S. 651.

101 That the injunction proceeding, which finally resulted in the dissolution of the injunction, was prosecuted in good faith for the purpose of testing the constitutionality of the rates, has never been questioned.

II.

The remedy of parties who paid higher rates than those which had been enjoined during the time the injunction was in force is confined to the bond that appellee was required to file as a condition of the granting of the injunction.

It was held in Russell v. Farley, 105 U. S. 433, that "where an injunction is granted without requiring the party to give bond or other undertaking, the court has no power to award damages to the injured party except by making such a decree in the matter of costs as may be deemed equitable." At page 438, the court said:

"And if the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party; for the damage arising from the act of the court itself is damnum absque injuria, for which there is no redress except a decree for the costs of the suit, or, in a proper case, an action for malicious prosecution. To remedy this difficulty, the court, in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act."

The ruling in this case has been followed by the Supreme and the subordinate Federal courts, and the State courts.

102 Houghton v. Meyer, 208 U. S. 149; Meyer v. Block, 120 U. S. 206-211; Cimotti Unhairing Co. v. American Fur Refining Company, 158 Fed. 172; United States v. Lewis Publishing Co., 160 Fed. 989; Scheck v. Kelly, 95 Fed. 941; Palmer v. Foley, 71 N. Y. 109; St. Louis v. St. Louis Gas Light Co., 82 Mo. 349-353.

The case last cited contains a very full and interesting discussion of the question, and concludes as follows:

"A suit in which no bond or undertaking is provided for by law or exacted by the court, as to any damages resulting to the defendant from a legitimate prosecution therof, presents an instance of damnum absque injuria, and is like any ordinary suit which leaves the defendant heir to much inconvenience and pecuniary loss, notwithstanding a final judgment in his favor."

Other cases from the State courts are collected in a note to the case of Mark v. Hyatt, 135 N. Y. 306 in 18 L. R. A. 275.

The court in the opinion in this case, says:

"Parties from whom excessive rates have been exacted were not confined to suing on the bonds. They also had the right given them by law to recover the overcharges, which was not destroyed by the injunction, but was simply suspended."

The order granting the injunction, which is printed at page 46 of the record, provides that the statutory passenger rate and the freight rates prescribed by the State Commission "are hereby suspended, and the enforcement of each and all thereof be, and the same is
103 hereby restrained and enjoined until the further order of the court," and, "it is further ordered that no suit or suits, action or actions, shall at any time be instituted or maintained against complainant, its officers, agents, and employees by any of the defendants for or on account of its failure to keep in force any of the aforesaid inhibited rates. * * * That the defendants, Henry Leigh and George McLean (who were made defendants as representatives of all passengers and shippers), and all persons, and each of them, from and after the time they shall have knowledge of this order, be enjoined from at any time instituting any such suit or action for or on account of any failure of complainant to keep in effect and observe such inhibited rates, or to recover damages by reason of such failure during the time this order shall continue in effect." Then follows an order requiring the complainant to execute a bond conditioned that it shall keep a correct account showing the difference between the rates actually charged, and the inhibited rates, and if it should eventually be decided that the order enjoining the enforcement of the inhibited rates should not have been made, that the complainant should, within a time to be fixed by the court, refund to the party entitled thereto the excess charged over the inhibited rates. The foregoing orders were made in September, 1908, and the following February a petition was filed on the part of the defendants in the original proceeding, alleging that complainant had put into effect excessive freight and passenger rates on intra-state shipments,
104 and praying that the injunction be so modified as to require complainant to establish reasonable rates during the pendency of the litigation, and to furnish additional bond and to keep a correct account showing the difference between the rates charged and the inhibited rates. And on the 1st day of June, 1909, an order was entered requiring the complainant to put into effect, not later than June 7, 1909, a tariff of rates that would yield a net increase of 33 1-3 per cent above the revenue produced by the inhibited rates, in pursuance of which order a schedule of rates agreed upon between the complainant and defendants in said cause, and known as the "court rate," was put into force, and continued in force during the pendency of the proceeding, and until the final dissolution of said injunction, and an additional bond in the penal sum of $800,000, conditioned substantially as hereinbefore stated, was filed by complainant in said cause (Record, page 62).

We respectfully submit that the foregoing orders suspended the enjoined rates as to the complainant during the pendency of the

proceeding, and that any damage that accrued to passengers and shippers on the railroad during the time of such suspension was the result of the court's action, and the liability of the complainant for damages rests upon the bonds executed by the complainant pursuant to the orders of the court in the original proceeding.

105 The rule, as to the remedy where an injunction has been wrongfully issued and dissolved, is thus stated in 2 High on Injunctions, section 1648:

"Some conflict of authority exists as to whether a defendant in an injunction suit may, by an action on the case, recover damages for having been enjoined without cause, and the rule has been broadly stated that no such right of action exists, and that his only remedy is by suit upon the injunction bond. The better doctrine, however, seems to be that defendant's right of action at common law is not merged in the remedy upon the bond, and that an action on the case will lie. But to support such action, the plaintiff's pleadings must clearly negative the existence of probable cause for the injunction; it will not suffice to allege that the writ was unjustly and wrongfully sued out, but there must be distinct allegations of malice or a want of probable cause."

This rule is almost universally followed by the courts. Harless v. Consumers Gas Trust Co., (Ind.) 43 N. E. 456; Asevado v. Orr, 110 (Cal.), 34 Pac. 778; Glen Jean, etc., v. Kanawha Ry Co. (W. Va.), 35 S. E. 978, and cases cited; Mitchell v. R. R. Co., 75 Ga. 398; Hayden v. Keith (Minn.), 21 N. W. 195; Cayuga Bridge Co. v. Magee, 2 Page, Chancery, 116-122; Lawton v. Green, 64 N. Y. 325-330; Palmer v. Foley, 71 N. Y. 106-109; Cimiotti Unhairing Co. v. American Fur Refining Co., 168 F. 529-531; Meyers v. Block, 120 U. S. 206, 211; Iron Mountain Bank v. Mercantile Bank, 4 Mo. App. 505.

The foregoing cases cited many others in support of the rulings, which it is unnecessary to repeat here.

106 In Glen Jean, etc., v. Kanawha Ry. Co., the court said:

"These cases all sustain the text found in High on Inj., section 1648, and 10 Enc. Pl. & Pr., 1119, and there are none to the contrary. The very purpose of the Legislature in requiring an injunction bond to cover actual damages sustained was to supply this defect in the common law, and was not declarative thereof. The defendant to a dissolved injunction has two remedies: 1 (statutory) on the injunction bond; the other (common law), for the malicious use of judicial process, without probable cause. Where no bond is given, the latter remedy alone exists. It becomes the defendant to an injunction suit to see that a good and sufficient bond is given, and, unless he does so, he can recover no damages in the presence of probable cause, and in the absence of malice."

In Asevado v. Orr, the court used the following language in discussing the question:

"The law has provided that in certain classes of actions, a defendant may be restrained during the pendency of the action from enjoying property, or exercising dominion over the same, where his

right to the property or of dominion is controverted by the plaintiff; and in such cases the plaintiff is required to indemnify the defendant against any injury that he may sustain from such restraint if it shall finally be determined that the plaintiff did not have a cause of action. The amount of this undertaking is fixed by the court as a measure of damage to be sustained, and is the limit of the defendant's right of recovery. It is to be assumed that the court has properly exercised its discretion in determining this amount; but if, at any time pending the litigation, it should be made to appear to the court that the undertaking is insufficient, it would have the power, and it would be its duty, to require an increase of the undertaking as the condition of allowing the plaintiff to continue the injunction. It is only when the process of the court is abused, or when the plaintiff seeks to avail himself of its power to
107 harass or injure another by suing him upon a charge in which he is conscious of having no right of action, that he becomes amenable in damages for bringing such suit. Such an action is, however, in the nature of a malicious prosecution, and in any action to recover damages therefor want of probable cause and malice are essential ingredients to the complaint, and must be clearly alleged and proved in order to sustain the action."

In Harless v. Consumers Gas Trust Company, the court, speaking of the early practice in such cases, said:

"In the early history of equity jurisprudence, temporary restraining orders were issued without requiring any bond or other security. If upon final hearing the injunction was dissolved, the party enjoined might recover his costs. But he had no other remedy except an action on the case when the suit was malicious and without probable cause. As the party enjoined frequently suffered great damages for which he had no adequate remedy, the custom grew up in the equity courts that the chancellor, in the exercise of his discretion, might require of the plaintiff a pledge or bond to indemnify the defendant against loss in the event the injunctive order should be wrongfully issued. Upon the dissolution of the injunction, the court might, in the same proceeding, determine whether or not the defendant was entitled to damages, and assess the same, or cause them to be assessed by reference to a master," and cited many authorities in support of its ruling.

In Meyers v. Block, the court said:

"Without a bond for the payment of damages or other obligation of like effect, a party against whom an injunction wrongfully issues can recover nothing but costs, unless he can make out a case of malicious prosecution. It is only by reason of the bond, and upon the bond, that he can recover anything. When, therefore, the condition of the bond in these cases declares that the obligors will pay such damages as the obligee may recover against them,
108 it must mean that they will pay such damages as he may recover by a suit on the bond itself."

No case is cited by the court in support of the ruling that would make this case an exception to the general rule. The only cases cited in the brief of counsel are: Chicot Lumber Company v. Dardell, 84

Ark. 145; New York v. Brown, 179 N. Y. 303. Neither of these cases has the most remote bearing on the question we are discussing.

In Chicot Lumber Co. v. Dardell, the plaintiff had taken possession of, and converted, property of the defendants, who filed a cross bill asking for damages for the property so converted, and the court held that the fact that there was an injunction which may or may not have aided the lumber company in making the conversion would not have prevented the defendant from recovering the value of his property, which the court said was a purely legal right arising in equitable suit. The facts are explained at some length at page 12 of our original brief.

The case of New York v. Brown, involved the same principle. Brown occupied a pier on East river under revocable license, from the city, and an agreement to pay a stipulated rental. The commissioner of docks revoked the license and notified Brown that under the Greater New York charter, the use of the pier for dumping was illegal. He commenced an action to restrain the city from
109 interfering with his occupancy, which was dismissed on hearing. The city afterward sued him at law for the use and occupation of the pier. The court held that the damages for the use and occupation of the pier did not arise out of the granting of the injunc-ion, and was recoverable in an action at law. The courts of New York have steadily adhered to the rule for which we are contending—that there is no liability outside of that imposed by the bond.

The injunction in this case did not have the effect to deprive the parties affected of any property right. It suspended the tariffs complained of by the complainant until the question of their reasonableness and validity could be investigated and determined by the court, and, for the purpose of protecting the legal rights of passengers and shippers, the court exacted the bonds that have been referred to. They afforded ample protection, and it was at all times open for additional bond to be asked and required in case there should be doubt as to the sufficiency of the existing bond, and that, in fact, was done, and an additional bond in the sum of $800,000 was required in this case for the better protection of passengers and shippers on the railroad.

If a different rule obtained and injunction bonds should be treated as merely cumulative of common law liability very few cases would arise in which an independent common law action would not lie, as almost every case in which an interlocutory injunction is
110 found to have been improperly issued would involve a denial or deprivation of some common law right of the defendant, resulting in damage to him, and the rule established by the courts would have been reversed.

In the case of Houghton v. Meyers, supra, a restraining order was issued on May 31, 1902, by the Supreme Court of the District of Columbia. The case was heard and a decree perpetuating the restraining order was entered on March 10, 1903, from which an appeal was taken to the Court of Appeals of the District, which resulted in the reversal of the decree. The case was returned to the

district court and a decree entered dismissing the bill and dissolving the injunction, but refusing to assess damages. An appeal was taken from the latter decree to the District Court of Appeals and a decree was there entered for the amount of the difference between postage due the Government at third-class rates and that paid at second-class rates from the date of the filing of the injunction until the 16th of June, 1904, when the mailing at second-class rates was discontinued. The Supreme Court of the United States reversed so much of the decree as allowed damages after the date of the original decree in the District Supreme Court perpetuating the injunction, holding that the judgment giving damages after the date of the final decree was erroneous. The court's action was evidently based on the ground that the injunction bond ceased upon the entering of
111 the final decree, but if there had been a liability on the part of the plaintiff in the proceeding, independent of the bond it would have been competent, and better practice, for the court to have directed a judgment against the plaintiff in the proceeding for so much of the damage as accrued after the date of the decree and if there had been any difficulty in apportioning the amount between the two periods it would have remanded the case with direc tions for proper steps to be taken for that purpose. That case is important, because the claim of the Government was for service in carrying publications through the mail at a rate less than it was entitled to charge. The facts were the converse of those existing in this case, but the principle applicable is the same in both cases.

III.

As during the six years the injunction was in force over 100,000 claims similar to that of the appellant arose, the trial court when it dismissed the bill entered an order requiring all parties, who had any claims by reason of overcharges paid during the time the in junction was in force, to present them to the master for allowance The order included not only all claims that arose while the injunc tion bonds were in force, but also all that arose after the injunction had been made perpetual by the trial court and the bonds released and directed the master to report the two classes of claims separately (Rec.), thus giving every one an opportunity to obtain resti
112 tution whether their claim was based on the bond or a com mon law right to recover the overcharges. If any liability beyond the bond existed the court, by whose error overpayments were made, had the right, and it was its duty to cause restitution to be made. It is true it might have refused to do so and allowed the parties to institute separate proceedings, but when it undertook to provide for restitution under its own direction, as it did by the ap pointment of a master to pass upon the claims in terms broad enough to include all claims whether they arose under the bond or not, its jurisdiction was exclusive. This principle is asserted by this court in the case of Lamb v. Ewing, 54 Fed. 269, 4 C. C. A. 320, in the following statement of the rule in such cases:

"The rule is well settled that where a court rightfully take

jurisdiction over the parties and the subject-matter of a controversy it has the right not only to render judgment in the first instance, but also to secure to the prevailing party the fruits of such judgment, and the original jurisdiction is a continuing one for that purpose; and as corollaries to the general rule it is also equally well settled that, when third parties have rights in or claims to property taken into the possession of the court under process issued against the original parties, such third parties may intervene in the proceedings for the protection of their rights; and, further, that where the process of the court is wrongfully and illegally used to the injury of a third party, the latter may appeal to the court for proper redress. If the Federal courts were deprived of the power to protect third parties against injuries resulting from the enforcement of
113 process issuing from such courts by reason of the citizenship of the injured party, or because the amount of the injury was less than $2,000, it would work great hardship upon the individual citizen, and be a most serious blot upon the system of Federal jurisprudence. The power of the courts of the United States in these particulars is as ample as that of the courts of the States, and the technical question of jurisdiction is solved by the ruling that in all ancillary or auxiliary proceedings for the enforcement of judgments rendered, and in proceedings for the protection of the rights of third parties, the jurisdiction is supported by that of the original action or suit. Minnesota Co. v. St. Paul Co., 2 Wall. 609; Wiswall v. Sampson, 14 How. 52; Freeman v. Howe, 24 How. 450; Gumbel v. Pitkin, 124 U. S. 146, 8 Sup. Ct. Rep. 379; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. Rep. 27; Fuel Co. v. Brock, 139 U. S. 216, 11 Sup. Ct. Rep. 523."

And the principle applied by the Supreme Court in the case of Northwestern Fuel Co v. Brock, 139 U. S. 216, where the court held that the circuit court had jurisdiction to correct by its own order that which, according to the judgment of the Supreme Court, it had no authority to do in the first instance, and in that case the jurisdiction to render judgment for restitution was exercised in a case over which the court did not originally have jurisdiction for lack of proper citizenship of the parties. The court says:

"The power is inherent in every court, whilst the subject of controversy is in its custody, and the parties are before it, to undo what it had no authority to do originally, and in which it, therefore, acted erroneously, and to restore, as far as possible, the parties to their former position. Jurisdiction to correct what had been wrongfully done must remain with the court so long as the parties and the case are properly before it."

114 In this proceeding all shippers and parties affected by the rates charged by the railroad were constructively parties to the proceeding, In re Englehard, 231, U. S. 646, and were within the jurisdiction of the court for the purpose of all orders and proceedings that might be had in the cause, whether the same were beneficial or prejudicial to their rights. Being bound by the proceedings and orders of the court, it was eminently just and proper

that the court should have and exercise the jurisdiction to protect them against any injurious effect of its orders.

Speaking with regard to the jurisdiction of courts of equity in cases like this, the Supreme Court said, in Russell v. Farley:

"The imposition of terms and conditions upon the parties before the court, is an incident to its jurisdiction over the case; and having possession of the principal case, it is fitting that it should have power to dispose of the incidents arising therein, and thus do complete justice, and put an end to further litigation. We are inclined to think that the court has this power; and that it is an inherent power, which does not depend on any provision in the bond that the party shall abide by such order as the court may make as to damages (which is the usual formula in England); nor on the existence of an express law or rule of court (as adopted in some of the States) that the damages may be ascertained by reference or otherwise, as the court may direct; this being a mere appendage to the principal provision requiring a bond to be taken, and not conferring the power to take one, or to deal with it after it has been taken. But whilst the court may have (we do not now undertake to decide that it has) the power to assess the damages, yet if it has that power,
115 it is in its discretion to exercise it, or leave the parties to an action at law."

It is now the established rule of the Federal courts to exercise their power to assess damages in such cases. Lea v. Deakin, 11 Biss, 23; 13 Fed. Rep. 514, 515; Coosaw Mining Co. v. Farmers Mining Co., 51 Fed. 107, 108; West v. East Coast Cedar Co., 113 Fed. 742-744, 51 C. C. A. 516; Chicot Lumber Co. v. Dardell, 84 Ark. 140-145. In the case last cited, which was relied on by counsel in this case, the court held that equity having properly taken jurisdiction of an equitable action, it was competent to adjudicate all the issues therein, both legal and equitable, relating to the subject-matter of the controversy.

It would be anomalous if a court of equity did not have the power to settle in one proceeding all claims arising out of the case before it, instead of permitting a hundred thousand suits to be instituted in different courts.

IV.

How great the injustice of permitting separate suits to be prosecuted in different courts would be is illustrated in this case as shown by the bill filed by the appellant in the State court, which is an exhibit to the supplemental bill in this case. He asks for a discovery requiring the railway company to produce in the
116 chancery court of Baxter county all its books and waybills in order that he may ascertain what is due him, although the court in its order of reference to the master required the railway company to furnish this information. If this party has a right to do it, then every shipper has the same right, and how could the railway company comply with such an order made in thousands of such cases? The mere statement is sufficient to show the gross injustice and hardships that would result from permitting such pro-

ceeding, while the action of the court in giving every one an opportunity to present his claim to the master in chancery, to have it adjudicated, can result in no injustice to any one, and is therefore equitable and just to all parties. That in such a case a court of equity, even in an original proceeding, will assume jurisdiction to avoid a multiplicity of suits has been determined by this court many times.

Wyman v. Bowman, 127 Fed. 257-263. This case distinguishes the case of Hale v. Allison, cited in the courts in a particular which we think is decisive. It says, referring to that case:

"There was no community of interest among the defendants in the controversies presented for litigation, and the convenience of the complainant in pursuing the single suit was overcome by the inconvenience of such a course to the several defendants. In this case there is a community of interest among the defendants in every question of fact and of law presented by the controversies, and the convenience of all parties will be better served by the
117 determination of them here in a single suit than by repeated decisions of them in nine separate actions at law."

There can be no question that in the case at bar there is a community of interest in the questions of law and fact incident to the claims of the different claimants and that the great hardship to the one party will be obviated, without any cause of inconvenience to the other party, by disposing of them in a single suit. In this connection we call attention to the language of the court in Hale v. Allison, at page 78, viz:

"We are not disposed to deny that jurisdiction on the ground of preventing a multiplicity of suits may be exercised in many cases on behalf of a single complainant against a number of defendants, although there is no common title nor community of right or interest in the subject-matter among such defendants, but where there is a community of interest among them in the questions of law and fact involved in the general controversy."

It can not be denied that such a community of interest as is here described exists among the claimants in this case. The same rule was recognized in Bitterman v. Louisville & Nashville Railroad, 207 U. S. 205-226, and in Tift v. Southern Ry. Co., 123 Fed. 789-795, affirmed in 148 Fed. 1021, 79 C. C. A. 526, and in 206 U. S. 428.

118 Your petitioner respectfully prays, for the foregoing reasons, that a rehearing be granted, and the decree of the district court affirmed.

And your petitioner will ever pray.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, *Appellee.*

I, John M. Moore, certify that I am of counsel for the above-named petitioner; that I have read the foregoing petition, and believe the cause proper to be reheard upon the points set forth in said petition; that the reasons therein given for a rehearing of this appeal are, in my opinion, well-founded in point of law;

and that the relief prayed for is proper and equitable to be granted therein.

JOHN M. MOORE.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 4, 1915.

119 (*Order Denying Petition for Rehearing.*)

May Term, 1915.

MONDAY, May 17, 1915.

This cause came on this day to be heard upon the petition for a rehearing, filed by counsel for appellee.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

May 17, 1915.

(*Petition for Appeal to Supreme Court, U. S.; Assignment of Errors and Order Allowing an Appeal.*)

Comes the appellee, the St. Louis, Iron Mountain & Southern Railway Company, and says there are errors in the record and proceedings in the above entitled cause, and says the jurisdiction in said cause does not depend upon the opposite parties being aliens and citizens of the United States, or citizens of different states, and does not arise under the patent, copyright or revenue laws of the United States, and is not an admiralty case; and for the purpose of having the same reviewed prays an appeal to the Supreme Court of the United States from the order and decree entered in said cause on the 8th day of March, 1915, and makes the following assignment:

The court erred:

1. In holding that the action was not based on the injunction bonds filed in said original proceeding, but on the statutory liability arising out of the alleged exaction by the appellee of excessive rates during the time said injunction was in force.

2. In holding that notwithstanding the District Court required appellee to file injunction bonds conditioned to pay all damages that might arise from or grow out of overcharges during the time the injunction was in force, and retained jurisdiction of the original proceeding for the purpose of ascertaining and enforcing the liability of appellee to parties of whom excessive rates had been exacted, they were not confined to their remedy on the bonds,

120 but could institute and maintain independent actions for the recovery of the alleged overcharges.

3. In holding that parties from whom excessive rates had been exacted during the time the injunction was in force were not confined to their remedy on the injunction bonds, but could bring independent actions to recover the alleged overcharges.

4. That the action and decree of the District Court could not be sustained on the ground of preventing a multiplicity of suits.

For which errors the appellee prays that the judgment and decree of the Circuit Court of Appeals in said cause be reversed and judgment rendered in favor of appellee, and for costs.

MOORE, SMITH & MOORE,
J. M. MOORE,
Attorney- for Appellee.

The foregoing appeal as prayed for is hereby allowed and bond in the sum of Ten Thousand Dollars ($10,000) is hereby approved this 28th day of May, 1915.

WALTER H. SANBORN,
Senior Circuit Judge.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, May 28, 1915.

(Bond on Appeal to Supreme Court, U. S.)

Know all men by these presents:

That we, the St. Louis, Iron Mountain & Southern Railway Company as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto William F. McKnight, J. Sam Rowland and George W. Bellamy, Railroad Commissioners of the State of Arkansas, Howard H. Gallup and William J. Metcalf, in the sum of Ten Thousand dollars; to be paid to said parties or to any other party in interest; for which payment well and truly to be made we bind ourselves and each of us, jointly and severally, by these presents.

Sealed with our seals and dated this the 28" day of May, 1915.

Whereas the above named appellant seeks to prosecute its appeal to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the United States
121 Circuit Court of Appeals for the Eighth Judicial Circuit;

Now, therefore, the condition of this obligation is such that if the above named appellant shall prosecute its appeal to effect and answer all costs and damages that may be adjudged against it, if it shall fail to make good its plea, then this obligation is to be void; otherwise to remain in full force and effect.

ST. LOUIS, IRON MOUNTAIN &
SOUTHERN RY. CO.,
By EDW. J. WHITE,
General Solicitor.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
[SEAL.] By FITZHUGH BURNS,
Attorney-in-Fact.

Attest:
M. A. CROWTHER, *Agent.*

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 28th day of May, A. D. 1915, personally appeared before me Fitzhugh Burns who being duly sworn desposes and says, that he is attorney-in-fact of the Fidelity and Deposit Company of Maryland, that the seal affixed to the foregoing instrument is the Corporate Seal of said Corporation and that said instrument was signed and sealed on behalf of said Corporation by authority of its Board of Directors and the said Fitzhugh Burns acknowledged that he executed said instrument as such attorney-in-fact and as the free act and deed of said Corporation.

M. E. HAWKINS,
Notary Public, Ramsey County, Minn.

My Commission Expires Aug. 2nd, 1918.

The within bond and the surety thereon are hereby approved.

WALTER H. SANBORN,
Senior Circuit Judge.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, May 28, 1915.

122 *(Affidavit as to Amount in Controversy.)*

J. M. Moore states that he is the attorney of record of the appellee, the St. Louis, Iron Mountain & Southern Ry. Co. He further states that the amount in controversy in said cause is five thousand dollars exclusive of interest and cost.

JOHN M. MOORE.

Subscribed and sworn to before me the 28" day of May, 1015.

[SEAL.] JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, May 29, 1915.

123 The President of the United States to William F. McKnight, J. Sam Rowland, and George W. Bellamy, Railroad Commissioners of the State of Arkansas, Howard H. Gallup and William J. Metcalf, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to an appeal allowed and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, wherein the St.

Louis, Iron Mountain & Southern Railway Company is the appellant and you are the appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Judge of the United States Circuit Court of Appeals for the Eighth Judicial Circuit, this the 28th day of May, in the year of our Lord, One Thousand Nine Hundred and Fifteen.

WALTER H. SANBORN,
Senior Circuit Judge.

I acknowledge service of the foregoing citation and the delivery of a copy thereof to me on this the 25 day of June, 1915.

ALLYN SMITH,
Attorney for Appellees.

[Endorsed:] No. 4284. George W. Bellamy, et al., as Railroad Commissioners, etc., et al., Appellants, vs. St. Louis, Iron Mountain and Southern Railway Company. Citation on Appeal to Supreme Court of the United States. Filed Jun- 26, 1915. John D. Jordan, Clerk.

124 *(Clerk's Certificate.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Arkansas as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, records, entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein George W. Bellamy, et al., are Appellants and St. Louis, Iron Mountain and Southern Railway Company is Appellee, No. 4284, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

Circuit, at office in the City of St. Louis, Missouri, this twenty-sixth day of June, A. D. 1915.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[United States internal revenue documentary stamp, series of 1914, ten cents, cancelled Jun- 26, 1915. John D. Jordan.]

Endorsed on cover: File No. 24,823. U. S. Circuit Court Appeals, 8th Circuit. Term No. 183. St. Louis, Iron Mountain & Southern Railway Company, Appellant, vs. William F. McKnight, J. Sam Rowland and George W. Bellamy, Railroad Commissioners of the State of Arkansas. Filed July 6th, 1915. File No. 24,823.

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IN THE

Supreme Court of the United States

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO.....*Appellant*,

v. No. 183.

WILLIAM F. McKNIGHT, J. SAM ROWLAND and GEORGE W. BELLAMY, RAILROAD COMMISSIONERS OF THE STATE OF ARKANSAS.....*Appellees.*

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF THE CASE.

On July 25, 1908, the appellant filed a bill in the United States Circuit Court for the Western Division of the Eastern District of Arkansas against the railroad commissioners of that State to enjoin the enforcement of freight rates on railroads within the State theretofore put in force by said commission,

and a rate of two cents per mile for the transportation of passengers, prescribed by a statute of the State passed on February 9, 1907, and promulgated by the said railroad commissioners by an order issued May 15, 1907, on the ground that said rates were confiscatory and in violation of the Fourteenth Amendment to the Constitution of the United States. A temporary injunction was granted on September 3, 1908, upon the filing by complainant of an injunction bond, with sureties, in the sum of $200,000. On June 23, 1909, the court made an order requiring the complainant to file an additional injunction bond in the sum of $800,000, without sureties, which was accordingly done. On May 11, 1911, a final decree was rendered, perpetually enjoining said passenger and freight rates. Said pleadings, orders and bonds are set out at length at pages 3-45 of the printed record. An appeal was taken to this court, and on the 8th day of June, 1913, the decree was reversed. (Allen *et al.* v. St. Louis, Iron Mountain & Southern Ry. Co., 230 U. S. 553.) On July 18, 1913, the mandate of the Supreme Court was filed in the district court, and an order entered dismissing the bill without prejudice, and dissolving the temporary and permanent injunctions theretofore granted. This order contains the following provision:

> "And thereupon, the court, of its own motion, and against the objection of the complainant, refers, under rule 15 of this court, the matter of damages alleged to have

been sustained by the defendants, the Railroad Commission of the State of Arkansas, by reason of the granting of the temporary and permanent injunctions herein, to Jeremiah G. Wallace, Esq., who is hereby appointed a special master for the purpose of determining the damages sustained. That in determining these damages, for the recovery of which the said commissioners are not acting for themselves, but for the benefit of all persons, shippers, consignees and passengers, who have sustained any damages by reason of the granting of said injunctions, the master is hereby authorized, for the purpose of ascertaining these facts, to examine witnesses, administer oaths, and call upon the plaintiff herein for any books or papers, or transcripts thereof, which, in his opinion, are necessary for the purpose of enabling him to determine any facts in issue in connection with any claim filed with him."

Rule 15 referred to in this order is as follows:

"In all cases in which an injunction has been granted, and a bond executed by the complainants, damages sustained by the party enjoined, in case the injunction is dissolved, may be assessed in the same proceeding, either by the court or by reference to a master, and judgment entered in the same action against the sureties on the bond; provided, however, that unless the damages are thus assessed in the cause, or a judgment entered that the party enjoined is entitled to no damages by reason of the improper granting of the injunction, he may proceed on the bond in an action at law

without any further order or leave of the court."

The order further directed the special master to give notice by publication, in a manner prescribed, that all persons having any claims against the complainant by reason of the granting of said injunction should present the same to him within a time designated, and file proofs thereof with him, and that he should make a report of his findings to the court, together with the evidence taken by him. (Rec. 48.)

On the 9th of January, 1914, complainant filed a supplemental bill, setting out the aforesaid proceedings, alleging that they were still pending and undetermined, and notwithstanding said proceedings and orders of the court, and the election of the defendants in the main case, as the representatives of all passengers and shippers on the complainant's railroad within the State, to proceed in the district court by a reference to the special master to take an account of the damages sustained by reason of the granting of said injunctions, the defendant Howard H. Gallup had instituted suit in a court of the State for the recovery of the difference between the passenger and freight rates so enjoined, and the rates charged said defendant by the complainant during the time the injunction was in force, and that the defendant, William J. Metcalf, and many other persons too numerous to be named, were threatening to institute similar ac-

tions against complainant. It was further alleged that a very large number of claims for refunds, amounting to more than half a million dollars, had been filed before the special master, and were under investigation by him. In many instances duplicate claims covering the same shipment by parties severally claiming to be entitled to the alleged excessive charges have been filed, and it will be necessary to determine who, among said claimants, was entitled to recover any allowance that might be made by the master in respect to such claims. Many persons whose claims were disallowed by the master were threatening to bring independent suits against complainant for the recovery of the claims presented to and disallowed by the master, and unless an order enjoining such proceedings should be made, many thousands of such suits would be brought, and complainant required to produce its books and records in defense of each of the suits so brought against it for the purpose of showing the difference between the inhibited rates and those actually charged by it, and would be put to great expense and be compelled to defend a multitude of suits; that many of the suits so instituted would embrace claims that had already been passed upon by the special master, and many in which allowances had been made by the special master to other parties, and thereby complainant would be exposed to great loss and damages by reason of double recoveries in favor of different parties

on the same claim, or else put to great expense, trouble and hazard in order to prevent great and irreparable loss and injury by reason of actions based upon claims presented to the special master. That the expense incurred in defending such suits would be very great and would involve serious loss to complainant without regard to the result of such litigation; that the district court possessed jurisdiction to determine all questions relating to complainant's liability, and the extent thereof, and having by the order of reference elected to exercise its jurisdiction in that behalf, with the acquiescence and consent of the defendants in that proceeding, it would be unjust and inequitable to allow such a multiplicity of suits as would result from independent actions prosecuted against the complainant; and prayed that said defendants, and all other shippers and passengers using complainant's railroad during the time said injunctions were in force, be restrained and enjoined from instituting and prosecuting actions for the recovery of overcharges during the time said temporary and permanent injunctions were in force. (Rec. 50.)

The defendant, William J. Metcalf, filed a motion to dismiss the supplemental bill on the ground that it did not state a cause of action. (Rec. 56.)

Howard Gallup filed a separate motion to dismiss on the grounds that the court had no jurisdiction of the action and that the bill stated no course of

action. The motion was accompanied by an answer admitting all the allegations of the supplemental bill, alleging that the action brought by him in the State court was commenced before any action was brought against him, and denying the authority of the district court to enjoin prosecution of said action under the provisions of the act of Congress, or the usage of courts of chancery; further alleging that his suit was not brought to recover against complainant on the injunction bond, but was a proceeding for an accounting by complainant to him for overcharges collected in violation of the laws of the State during the time the temporary injunction was in force, and the greater part of the overcharges sued for by him was collected by complainant after the rendition of the final decree perpetuating the injunction. (Rec. 57.)

Said defendants joined in an assignment of errors on the following, among other grounds: That the court had no jurisdiction to entertain the supplemental bill; and that it had no ancillary jurisdiction over the defendants, or either of them. (Rec. 71.)

A final decree was rendered by the district court in accordance with the prayer of the bill, perpetually enjoining the defendants from instituting any action at law or in equity against the complainant, in any court, for the recovery of any charges collected of them for the transportation of persons or property within the State of Arkansas, in excess of the rates

inhibited by the order of injunction during the time the same was in force. (Rec. 60.)

From this decree an appeal was prayed by the defendants to the circuit court of appeals for the Eighth Circuit, and on May 8, 1915, an order was entered modifying the decree of the district court, "so as to restrain only such actions as are brought on one or both of the bonds, and as thus modified that the order and decree of the district court in this cause be, and the same is hereby affirmed." (Rec. 79.)

Complainant filed a petition for rehearing which was overruled, and thereupon prayed and was allowed an appeal to this court. The jurisdiction of the district court in the main case was based on a Federal question, and not on diversity of citizenship of any parties to the proceeding.

ASSIGNMENT OF ERRORS.

In holding that defendants could institute and maintain independent actions for alleged overcharges from the time the injunctions were in force, notwithstanding injunction bonds had been filed and the district court had retained jurisdiction, in the original proceeding for the purpose of ascertaining and enforcing the liability of complainant to parties of whom excessive rates had been exacted.

In holding that parties of whom excessive rates had been exacted during the time the injunctions

were in force were not confined to their remedy on the injunction bonds, but could bring independent actions to recover the alleged overcharges.

In holding that the ruling and decree of the district court could not be sustained on the ground of preventing a multiplicity of suits.

ARGUMENT AND BRIEF FOR APPELLANT.

JURISDICTION OF THE CIRCUIT COURT OF APPEALS:

The jurisdiction of the district court in the main case, as well as in this ancillary proceeding, was based on the ground that the cause of action arose under the Constitution and laws of the United States. Diversity of citizenship did not exist as a ground of jurisdiction, and the appeal from the decree of the district court lay direct to this court, and not to the circuit court of appeals, under sections 238 and 128 of the Judicial Code.

Union Planters Bank v. Memphis, 189 U. S. 71.

Carolina Glass Co. v. S. Carolina, 240 U. S. 305, 318.

THE DISTRICT COURT HAVING ASSUMED JURISDICTION TO ASSESS THE DAMAGES, ITS JURISDICTION WAS EXCLUSIVE.

The circuit court of appeals held that the district court had jurisdiction of all liabilities arising out of the injunction bonds and to restrain actions in other jurisdictions to collect such claims, but that its jurisdiction was limited to liability arising under the bonds. That the parties from whom excessive rates had been exacted were not confined to the bonds, but also had the right given them by law to recover the overcharge, which right was not de-

stroyed, but was simply suspended by the injunction, and as soon as the injunction was out of the way, the right and remedy for its enforcement stood the same as if it had never been issued. It also held that the action could not be suspended on the ground of multiplicity of suits. That the rights of each shipper or passenger, in case he relies, not on the bond, but on the statute, arose out of independent contract, and there is no community of right or interest such as is necessary to support jurisdiction in equity for the purpose of preventing a multiplicity of suits. (See opinion of the court of appeals, pp. 78-9 of the record.)

The reference to the master contained in the decree of the district court did not restrict his duties to claims arising under the bonds, but covered all damages sustained by any of the parties affected by the injunction. The order of reference was made under and in pursuance of Rule 15 of the district court which was intended to cover all the damages sustained by parties enjoined. (Rec. 48.)

The State Railroad Commissioners, as defendants in the main proceeding, represented all parties in interest, that is, all passengers and shippers. The appellees were therefore parties to the proceeding by representation. This is true for every purpose and as to every question that could arise in the exer-

cise of the jurisdiction of the district court in the progress of the case.

In re Englehard, 231 U. S. 646.

Reagan v. Farm Loan & Trust Co., 154 U. S. 362-390.

M., K. & T. R. R. Co. v. M., R. & W. Comnr., 183 U. S. 53-60.

The only damage that was or could have been sustained by the defendants under the case made by them was the difference between the inhibited rates and those put in force and collected of them by the appellants during the time the injunctions were in force, constituting overcharges, and it was for the recovery of such overcharges that suits were brought and threatened by them. The injunction bonds, and the orders under which they were made, in terms provided that appellant should keep a correct account showing the difference between the rates charged and the inhibited rates, with details necessary to identify each shipment, and the person by whom made, and the bonds were conditioned that if the injunctions were not eventually sustained, the complainant should, within a reasonable time to be fixed by the court, refund the excess charges collected while they were in force. (Rec. 40-3.)

The damage appellees seek to recover by outside proceedings in other courts is the same as that pro-

vided for by the injunction bonds, and the orders under which they were issued, as well as by the order of reference contained in the final decree. The ruling of the circuit court of appeals does not question the power of the district court to ascertain and enforce all claims based on the bonds, and restrain actions in other jurisdictions to collect the same, and concedes that the power would probably exist independent of the reservation contained in the court's orders, but attempts to distinguish between suits on the injunction bonds and the right of action conferred by law independent of the bonds, holding that in addition to the remedy on the bonds appellees had the right to proceed by independent actions at law in other jurisdictions, notwithstanding the district court had assumed jurisdiction for the purpose of adjusting the class of claims sought to be enforced by them in other jurisdictions.

It has come to be the established rule in Federal courts of equity, following the views stated in Russell v. Farley, 105 U. S. 433, that it is within the discretion of the court having possession of the case to have the damages assessed under its own direction as an incident of its jurisdiction, and for the purpose of doing complete justice and putting an end to further litigation.

Lea v. Deakin, 13 Fed. 514.

Leahman v. McQuown, 31 Fed. 138.

Coosa Mining Co. v. Farmers Mining Co., 51 Fed. 107.

Leslie v. Brown, 90 Fed. 174.

Tyler Mining Co. v. Lost Chance Mining Co., *Ib.* 22.

Cimiotti Unhairing Co. v. American Fur Refining Co., 158 Fed. 171.

Mississippi Valley Fuel Co. v. Watson Coal Co., 202 Fed. 124-5.

Ridlich Mfg. Co. v. Rice & Co., 203 Fed. 722.

Any damage caused to a party by the improper issuance of an injunction is based on the violation of a legal right which would give a right of action to the party injured upon the dissolution or suspension of the injunction, and the denial of the right of a party so situated to maintain independent actions in cases where the court that granted the injunction had assumed jurisdiction for the purpose of ascertaining and adjusting the damages is not based on the view that the legal right was destroyed, but rests solely upon the ground that the court that issued the injunction having taken jurisdiction to settle the damages should be allowed to continue in possession of and decide every question involved in the case, and the power to restrain parties from bringing independent suits is exercised to prevent a conflict of author-

ity between the courts, and for the protection and preservation of the jurisdiction of each tribunal free from encroachment by others.

In Lea v. Deakin, 13 Fed. 514, Circuit Judge Drummond said:

> "That court that orders the injunction prescribes the terms upon which it shall be issued, and may require a bond, stipulation, or undertaking as a condition upon which it shall be issued or not, according to its own view of the circumstances of the case. An assessment of damages thus becomes an incident of the principal case, and enables the court to do entire equity between the parties. If the party against whom the injunction has been issued can thus be idemnified, it would seem to be the duty of the court to proceed in the case, and not compel him to resort to an independent action at law to accomplish that result."

Mr. Justice Lurton, while on the circuit court of appeals, held:

> "It is a rule of almost universal application that, between courts of the same sovereignty and concurrent jurisdiction, the court which first acquires jurisdiction of the controversy, or of the res, should be suffered by every other court to decide every question within the sphere of the pending cause, and to continue in the possession of the subject-matter of the controversy until every question before it shall be decided and the res discharged from its control."

Phelps v. Mutual Reserve Fund Life Assn., 112 Fed. 464-5.

> "The rule is well settled that where a court rightfully takes jurisdiction over the parties and the subject-matter of a controversy, it has the right not only to render judgment in the first instance, but also to secure to the prevailing party the fruits of such judgment, and the original jurisdiction is a continuing one for that purpose; and as corollaries to the general rule, it is also equally well settled that where third parties have rights in or claims to property taken into the possession of the court under process issued against the original parties, such third parties may intervene in the proceedings for the protection of their rights; and, further, that where the process of the court is wrongfully and illegally used to the injury of a third party, the latter may appeal to the court for proper redress. Lamb v. Ewing, 54 Fed. 269."

In French v. Hay, the complainant in a suit that was removed from a State court to the circuit court of the United States got a decree in the State court, and sued on it in another State. The defendant in the proceeding filed a bill to enjoin the complainant from proceeding further in the State court, and the case coming to this court, it held that the circuit court having acquired jurisdiction in the original case, had the power to restrain the defendant, and it held that:

"The court on the original proceeding having jurisdiction in personam had power to require the defendant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory. Having the possession and jurisdiction of the case, that jurisdiction embraced everything in the case, and every question arising which could be determined in it until it reached its termination and the jurisdiction is exhausted. While the jurisdiction lasted it was exclusive, and could not be trenched upon by any other tribunal."

French v. Hay, 22 Wallace 252.

In Taylor v. Taintor, 16 Wal. 370, it is said:

"Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. It is indeed a principal of universal jurisprudence that where jurisdiction has attached to person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function."

See Prout v. Starr, 188 U. S., 537, 544.

In Harkrader v. Wadley, 172 U. S. 148-163, the court said:

"Two propositions have been so firmly established by frequent decisions of this court

> as to require only to be stated: * * * Second. When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike to both civil and criminal cases. Freeman v. Howe, 24 HOW, 450; Buck v. Colbath, 3 Wall. 334; Taylor v. Taintor, 16 Wall. 366; Es Parte Crouch, 112 U. S. 178."

In the case at bar, the district court having, prior to the suits brought and threatened by appellees, taken jurisdiction for the purpose of assessing the damages arising out of the injunction, this case, we submit, falls within the principle of those cited, without regard to the source of appellant's liability, whether it grew out of the violation of a right conferred by the common law or statute, or rested on the injunction bond. We have been unable to find any case holding that the courts would look to the source of the liability, or claim, in question, in the application of the rule that the court first acquiring jurisdiction may exercise it for the purpose of completely disposing of all questions involved without interference from other courts, and to that end may restrain parties from proceeding in other tribunals by ancillary proceedings instituted for that purpose.

> "It would seem that the prevention of the conflict of authority between the State and Federal courts, and the protection and

> preservation of the jurisdiction of each, free from encroachments by the other, are considerations which lie at the very foundation of ancillary jurisdiction. A bill filed to continue a former litigation in the same court, or which relates to some matter already partly litigated in the same court, or which is an addition to a former litigation in the same court, by the same parties or their representatives standing in the same interest, or to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court by the same or additional parties, standing in the same interest, is an ancillary suit. Bates on Federal Equity Procedure, p. 113, sec. 97, cited and approved in Julian v. Central Trust Company, 193 U. S. 93, 113.

R. R. Co. v. Bellamy, 211 Fed. 172.

THE DISTRICT COURT HAD JURISDICTION OF THIS PROCEEDING ON THE GROUND THAT IT INVOLVED A FEDERAL QUESTION.

Important questions involving the effect to be given the decree and orders in the main case are involved. The supplemental bill alleges:

> "That in the final decree entered in this cause on the 11th day of May, 1911, it was ordered that the bond for injunction filed by the complainant be released and the surety thereon discharged from further liability, and complainant is advised and avers that the effect of said order was to relieve it from all liability under said bond and preclude any recovery of damages on

said bond, or by reason of or growing out of the injunctions ordered in the aforesaid cause."

It further averred:

> "That upon the rendition of the final decree making the temporary injunction permanent, said bond ceased by operation by law to have any effect, and complainant is not liable for any damage that may have accrued to any passenger or shipper on its line of railroad after the rendition of the final decree perpetuating the injunctions." (Record, 55.)

The right to recover damages growing out of the action of the court in granting the preliminary injunction, and afterward the permanent injunction, will depend on the effect to be given the final decree in the main case discharging the bond, from which an appeal was taken to the Supreme Court of the United States; to the judgment reversing and remanding the case, and to the decree of the lower court entered pursuant to the mandate, all of which will necessarily have to be considered in determining the question of liability, and involve Federal questions. In Tullock v. Mulvane, 184 U. S. 504, it was held that a bond for injunction in an equity court of the United States is a bond executed by virtue of an authority exercised by the United States, and the defense that no liability on the bond could arise until the court of the United States, in which the controversy is pending, has finally deter-

mined that the injunction should not have been granted, was the assertion of immunity from liability dependent on the authority exercised under the United States, and necessarily involved a Federal question. The court said:

> "It is clear that if such a bond, given in a Federal court of equity, is not to be construed with reference to the rules of law applicable to such bonds in the Federal courts, then there can be no general rule by which to determine the liability of the obligors on the bond. Their responsibility would be one thing in a court of the United States and a different thing in the courts of the various States."

At page 505 the court said:

> "The test is not in the particular source or form by which the authority of the United States has been conferred or is exerted, but whether such authority existed and was exercised and an immunity is claimed under it."

A number of cases are cited by the court on pages 506, 507 and 508. Among them is the case of Avery v. Popper, 179 U. S. 305, in which the court said the rule was declared to be that where a controversy in the state court presented a contention as to the validity, or proper construction, of an order or decree rendered by a court of the United States, a Federal question was presented reviewable by this court. At page 505 the court, citing the case

of Russell v. Farley, 105 U. S. 433, said: "It is settled that such court (meaning the National court in which the injunction bond has been given) has the inherent right to set the bond aside and to determine in its discretion whether a recovery could be had upon it," and that identical question is raised by the supplemental bill, in the allegations that the district court by the final decree in the main case discharged the complainant from all liability under the bond, or for damages growing out of the injunction.

M. K. T. v. Elliot, 184 U. S. 530-4.

R. R. Co. v. Bellamy, 211 F. 172.

In the suits that were enjoined appellees were seeking to recover damages alleged to have been sustained by the action of the court in granting a preliminary and, afterwards, a permanent injunction. The determination of the questions presented involved the construction of the provision of the decree releasing the bonds, as affecting liability under the preliminary injunction, and the effect of the final decree. It is appellant's contention that the effect of the final decree perpetuating the injunction, from which an appeal was taken to this Court, would necessarily have to be determined in settling the question of liability growing out of the temporary injunction, and that there could be no liability after the final decree was ren-

dered and the issues disposed of by the court after full hearing; that the temporary order of injunction and the bond ceased to operate, and were all merged into the final decree and order made by the court, which operated in the same manner as a final decree in any other case would, and any injury arising from the perpetuating of the injunction would be treated as the result of the action of the court, and not of the parties.

The rule, as to the remedy where an injunction has been wrongfully issued and dissolved, is thus stated in 2 High on Injunctions, section 1648:

> "Some conflict of authority exists as to whether a defendant in an injunction suit may, by an action on the case, recover damages for having been enjoined without cause, and the rule has been broadly stated that no such right of action exists, and that his only remedy is by suit upon the injunction bond. The better doctrine, however, seems to be that defendant's right of action at common law is not merged in the remedy upon the bond, and that an action on the case will lie. But to support such action, the plaintiff's pleadings must clearly negative the existence of probable cause for the injunction; it will not suffice to allege that the writ was unjustly and wrongfully sued out, but there must be distinct allegations of malice or a want of probable cause."

This rule is almost universally followed by the courts. Harless v. Consumers Gas Trust Co., (Ind.)

43 N. E. 456; Asevado v. Orr, 100 (Cal.), 34 Pac. 778; Glen Jean, etc., v. Kanawha Ry. Co. (W. Va.), 35 S. E. 978, and cases cited; Mitchell v. R. R. Co., 75 Ga. 398; Hayden v. Keith (Minn.), 21 N. W. 195; Cayuga Bridge Co. v. Magee, 2 Page, Chancery, 116-122; Lawton v. Green, 64 N. Y. 325-330; Palmer v. Foley, 71 N. Y. 106-109; Cimiotti Unhairing Co. v. American Fur Refining Co., 168 F. 529-531; Meyers v. Block, 120 U. S. 206, 211; Iron Mountain Bank v. Mercantile Bank, 4 Mo. App. 505.

The foregoing cases cited many others in support of the rulings, which it is unnecessary to repeat here.

In Glen Jean, etc., v. Kanawha Ry. Co., the court said:

> "These cases all sustain the text found in High on Inj., section 1648, and 10 Enc. Pl. & Pr., 1119, and there are none to the contrary. The very purpose of the Legislature in requiring an injunction bond to cover actual damages sustained was to supply this defect in the common law, and was not declarative thereof. The defendant to a dissolved injunction has two remedies: 1 (statutory) on the injunction bond; the other (common law), for the malicious use of judicial process, without probable cause. Where no bond is given, the latter remedy alone exists. It becomes the defendant to an injunction suit to see that a good and sufficient bond is given, and, unless he does so, he can recover no damages in the pres-

ence of probable cause, and in the absence of malice."

In Asevado v. Orr, the court used the following language in discussing this question:

> "The law has provided that in certain classes of actions, a defendant may be restrained during the pendency of the action from enjoying property, or exercising dominion over the same, where his right to the property, or of dominion, is controverted by the plaintiff; and in such cases the plaintiff is required to indemnify the defendant against any injury that he may sustain from such restraint if it shall finally be determined that the plaintiff did not have a cause of action. The amount of this undertaking is fixed by the court as a measure of damage to be sustained, and is the limit of the defendant's right of recovery. It is to be assumed that the court has properly exercised its discretion in determining this amount; but if, at any time pending the litigation, it should be made to appear to the court that the undertaking is insufficient, it would have the power, and it would be its duty, to require an increase of the undertaking as the condition of allowing the plaintiff to continue the injunction. It is only when the process of the court is abused, or when the plaintiff seeks to avail himself of its power to harass or injure another by suing him upon a charge in which he is conscious of having no right of action, that he becomes amenable in damages for bringing such suit. Such an action is, however, in the nature of a malicious prosecution, and in any action to recover damages therefor

want of probable cause and malice are essential ingredients to the complaint, and must be clearly alleged and proved in order to sustain the action."

In Harless v. Consumers Gas Trust Company, the court, speaking of the early practice in such cases, said:

"In the early history of equity jurisprudence, temporary restraining orders were issued without requiring any bond or other security. If upon final hearing the injunction was dissolved, the party enjoined might recover his costs. But he had no other remedy except an action on the case when the suit was malicious and without probable cause. As the party enjoined frequently suffered great damages for which he had no adequate remedy, the custom grew up in the equity courts that the chancellor, in the exercise of his discretion, might require of the plaintiff a pledge or bond to indemnify the defendant against loss in the event the injunctive order should be wrongfully issued. Upon the dissolution of the injunction, the court might, in the same proceeding, determine whether or not the defendant was entitled to damages, and assess the same, or cause them to be assessed by reference to a master," and cited many authorities in support of its ruling.

In Meyers v. Block, the court said:

"Without a bond for the payment of damages, or other obligation of like effect, a party against whom an injunction wrongfully issues can recover nothing but costs,

> unless he can make out a case of malicious prosecution. It is only by reason of the bond, and upon the bond, that he can recover anything. When, therefore, the condition of the bond in these cases declares that the obligors will pay such damages as the obligee may recover against them, it must mean that they will pay such damages as he may recover by a suit on the bond itself."

It was held in Russell v. Farley, 105 U. S. 433, that:

> "Where an injunction is granted without requiring the party to give bond or other undertaking, the court has no power to award damages to the injured party except by making such a decree in the matter of costs as may be deemed equitable."

See also Houghton v. Meyers, 208 U. S. 149.

No case is cited by the court in support of the ruling that would make this case an exception to the general rule.

The injunction in this case did not have the effect to deprive the parties affected of any property right. It suspended the tariffs complained of by the complainant until the question of their reasonableness and validity could be investigated and determined by the court, and, for the purpose of protecting the legal rights of passengers and shippers, the court exacted the bonds that have been referred to. They afforded ample protection, and it was at all times

open for additional bond to be asked and required in case there should be doubt as to the sufficiency of the existing bond, and that, in fact, was done, and an additional bond in the sum of $800,000 was required in this case for the better protection of passengers and shippers on the railroad.

If a different rule obtained, and injunction bonds should be treated as merely cumulative of common law liability, very few cases would arise in which an independent common law action would not lie, as almost every case in which an interlocutory injunction is found to have been improperly issued would involve a denial or deprivation of some common law right of the defendant, resulting in damage to him, and the rule established by the courts would have been reversed.

In the case of Houghton v. Meyers, *supra*, a restraining order was issued on May 31, 1902, by the Supreme Court of the District of Columbia. The case was heard and a decree perpetuating the restraining order was entered on March 10, 1903, from which an appeal was taken to the Court of Appeals of the District, which resulted in the reversal of the decree. The case was returned to the district court and a decree entered dismissing the bill and dissolving the injunction, but refusing to assess damages. An appeal was taken from the latter decree to the District Court of Appeals and

a decree was there entered for the amount of the difference between postage due the Government at third-class rates and that paid at second-class rates, from the date of the filing of the injunction until the 16th of June, 1904, when the mailing at second-class rates was discontinued. The Supreme Court of the United States reversed so much of the decree as allowed damages after the date of the original decree in the District Supreme Court perpetuating the injunction, holding that the judgment giving damages after the date of the final decree was erroneous. The court's action was evidently based on the ground that the injunction bond ceased upon the entering of the final decree, but if there had been a liability on the part of the plaintiff in the proceeding, independent of the bond, it would have been competent, and better practice, for the court to have directed a judgment against the plaintiff in the proceeding for so much of the damage as accrued after the date of the decree, and if there had been any difficulty in apportioning the amount between the two periods it would have remanded the case with directions for proper steps to be taken for that purpose. That case is important, because the claim of the Government was for service in carrying publications through the mail at a rate less than it was entitled to charge. The facts were the converse of those existing in this case, but the principle applicable is the same in both cases.

MULTIPLICITY OF SUITS.

As during the six years the injunction was in force over one hundred thousand claims similar to appellant's arose, the injustice of permitting separate suits to be prosecuted in different courts is apparent. The appellees ask for a discovery requiring the Railroad Company to produce in the Chancery court of Baxter county all its books and waybills, in order that he may ascertain what is due him, although the court in its order of reference to the master required the railway company to furnish this information to the master. If this party has a right to do it, then every shipper has the same right, and how could the railway company comply with such an order made in thousands of such cases? The mere statement is sufficient to show the gross injustice and hardship that would result from permitting such a proceeding, while the action of the court in giving every one an opportunity to present his claim to the master in chancery, to have it adjudicated, can result in no injustice to any one, and is therefore equitable and just to all parties. That in such a case a court of equity, even in an original proceeding, will assume jurisdiction to avoid a multiplicity of suits has been determined by this court many times.

The court of appeals held that the order of the district court could not be sustained on the ground

of preventing multiplicity of suits, because there was no community of right or interest between the claimants for restitution such as is necessary to support jurisdiction in equity for the purpose of preventing a multiplicity of suits, citing the case of Hale v. Allison, 188 U. S. 56. There is no analogy between the facts of that and the present case. The court said at page 78 of the opinion:

> "We are not disposed to deny that jurisdiction on the ground of preventing a multiplicity of suits may be exercised in many cases in behalf of a single complainant against a number of defendants, although there is no common title nor community of right or interest in the subject matter among such defendants, but where there is a community of interest among them in the questions of law and fact involved in the general controversy."

Thus drawing a distinction which we think is controlling in this case.

In Wyman v. Bowman, 127 Fed. 257, 263, the case of Hale v. Allison is distinguished. The court say at page 263:

> "There was no community of interest among the defendants in the controversies presented for litigation, and the convenience of the complainant in pursuing the single suit was overcome by the inconvenience of such a course to the several defendants. In this case there is a community of interest among the defendants in every question

> of fact and of law presented by the controversies, and the convenience of all parties will be better served by the determination of them here in a single suit than by repeated decisions of them in nine separate actions at law."

There can be no question that in the case at bar there is a community of interest in the questions of law and fact incident to the claims of the different claimants and that great hardship to the one party will be obviated, without inconvenience to the other party, by disposing of them in a single suit.

The rule was recognized in Bitterman v. Louisville & Nashville Railroad, 207 U. S. 205, 226, and in Tift v. Southern Ry. Co., 123 Fed. 789, 795, affirmed in 148 Fed. 1021, 79 C. C. A. 526.

Respectfully submitted,

JOHN M. MOORE,
For Appellant.

EDW. J. WHITE,
Of Counsel.

IN THE

Supreme Court of the United States

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILROAD COMPANY....*Appellant*,

v. No. 183

WM. F. McKNIGHT, *ET AL*.....*Appellees*.

REPLY BRIEF OF APPELLANT.

Appellees insist in their brief that inasmuch as the defendant Gallup brought his suit before the filing of the bill in this case no injunction could be issued against him to restrain that action, under the provisions of Sec. 720 of the Revised Statutes. It has been repeatedly held that that section does not apply to ancillary proceedings where the court had jurisdiction of the original proceeding. Gunter v. Atlantic Coast Line, 200 U. S. 273, 292, and cases cited.

They further contend that overcharges for freight and passenger fares are not damages within the purview of the bond; that damages claimed for overcharges are not properly assessable against it, because liability on the bond is limited to such as

arise from the suspension or invasion of vested legal rights by the injunction, and the overcharges are the result of the wrongful act of the appellant in collecting unreasonable rates during the time the injunction was in force, and not of the injunction; that only the railroad commissioners, who alone were parties to the proceeding, could recover on the bond. This is a fair statement of the grounds of their contention, and we submit that it is based on a total misconception of the proceedings in the main case, and the principles involved in this proceeding.

In Reagan v. Farm Loan & Trust Co., 154 U. S. 362, 390, and M. K. & T. Ry. v. M. R. & W. Comnr., 183 U. S. 53, 60, it was held, in a case like this, that the State had no interest in a suit prosecuted in its name, or by one of its agencies, except its governmental interest in the welfare of all its citizens in compelling obedience to the law, and in re Englehard, 231 U. S. 646, it was held, in connection with the claims of patrons of the Gas Company for refunds, that the city was the representative of all parties interested in the proceeding, and the gas consumers were parties by representation.

As to the other proposition—that refunds are not assessable under the bond, on the ground that the liability is limited to damages that arise from the suspension of a legal right, that the overcharges while the injunction was in force were

wrongful and unlawful, it would seem almost a waste of time to refute them, but we will ask leave in connection with these contentions to call attention briefly to the record, and the undisputed allegations of the supplemental bill. The order made by Circuit Court Judge Van DeVanter, granting the injunction, provided that the freight and passenger rates complained of "be and are hereby suspended and the enforcement of each and all thereof be and the same is hereby restrained and enjoined until further orders of the court." It ordered that no suits or action should be brought against complainant by the defendants, or any shipper or passenger, for or on account of the failure of the complainant to keep the inhibited rates in effect, or for damages by reason of such failure during the time the order should continue in force. It further provided that the complainant should execute a bond in the sum of $200,000, conditioned that it would keep a correct account showing the difference between the rates charged and the inhibited rates, the particular carriage in question, the stations between which the same occurred and the name of the person affected, and, if it should be eventually held that the order of injunction should not have been made, the complainant would in every instance make refunds to the parties entitled thereto within a time to be fixed by the court. (Order and bond executed pursuant thereto. Record 39-41).

The supplemental bill alleges that during the pendency of the proceeding an application was filed by the defendants to modify the injunction by requiring complainant to establish reasonable rates during the time the injunction was in force, and to furnish additional bond. That at the October term, 1908, an order was entered by the court requiring the complainant to file with the proceedings and put into effect a schedule of rates so arranged as to produce a net increase of 33⅓% of the revenue produced by the inhibited rates, pursuant to which order a schedule of rates agreed upon between the complainants and the defendants in the cause, and known as the "Court Rates," was put into effect, and continued in force until the order dismissing the bill was entered on the 18th day of July, 1913. That the order required complainant to file, and it did file an additional bond in the sum of $800,000, conditioned that complainant should issue to all passengers coupons, and to the shipper of freight, freight receipts or bills, identifying the service rendered and showing the difference in the rate charged and the inhibited rates, and should within a reasonable time, to be fixed by the court, refund the excess to the owners and holders of such coupons and receipts. (Record 52.) On July 5, 1909, an additional injunction bond was filed as required by said order. (Record 43).

It is not true, as contended, that the act of appellant in collecting higher rates than those prescribed by the railroad commissioners and the statute during the time those rates were suspended by the injunction was illegal, or that appellant was a wrongdoer. It was acting under the order and protection of the court, and after the order modifying the injunction was made, in 1909, the freight rates charged were those prescribed by the court under an order providing specifically, and with great care, for the protection of shippers and travelers on the road in case it should be decided that the order suspending and enjoining the rates should not have been made. Marked and unusual care for the protection of shippers and travelers on the railroad and for the enforcement of their rights to refunds, under direction of the court, was taken at every stage of the proceeding.

The position taken by the learned counsel is very remarkable in view of this record. They seem to have overlooked the broad powers of courts of equity in moulding their proceedings and orders so as to protect the interest of all parties and do complete justice by settling and disposing of all questions that might arise in, or grow out of, proceedings before them.

The district court in the opinion filed by it in this case said:

"It will thus be seen that when the temporary injunction was granted by the Court it reserved to itself the right to require the railroad and the sureties on its bond to 'refund in each instance to the party entitled thereto' the monies collected in excess of the enjoined rates as directed by the court. The orders of the court and the bonds given in pursuance thereof are just as much for the benefit of every shipper and passenger as those who were made parties defendants to the suit as representatives of all shippers and passengers."

"The rule is well settled that where a court rightfully takes jurisdiction over the parties and the subject-matter of a controversy it has the right not only to render judgment in the first instance, but also to secure to the prevailing party the fruits of such judgment, and the original jurisdiction is a continuing one for that purpose."

Lamb v. Ewing, 54 Fed. 273.

Farm Loan & Trust Co., 129 U. S. 213.

It is on this principle that courts of equity exercise the jurisdiction to take an account of the damages caused by injunctions issued and dissolved in proceedings before them. "The imposition of terms and conditions upon the parties before the court is an incident to its jurisdiction over the case; and having possession of the principal case, it is fitting that it should have power to dispose of the

incidents arising therein, and thus do complete justice, and put an end to further litigation."

Russell v. Farley, 105 U. S. 433, 445.

"The court that orders the injunction prescribes the terms upon which it shall be issued, and may require a bond, stipulation or undertaking as a condition upon which it shall be issued or not, according to its own view of the circumstances of the case. An assessment of damages thus becomes an incident of the principal case, and enables the court to do entire equity between the parties."

Lee v. Deakin, 13 Fed. 514, 515.

"The suit from its inception is in this court. The conduct of the parties is always under its supervision. The character of the questions involved, and the ease or difficulty in reaching a conclusion upon them, can nowhere be as well known as in the court which heard, considered and decided them. The court may also determine whether any further proceedings are necessary; and may content itself by fixing costs on the complainant, with an order that no further damages can be recovered against it."

Coosaw Mining Co. v. Farmers' Mining Co., 51 Fed. 107.

See cases cited at p. 14 *et seq.* of our original brief.

The only cases cited in appellees' brief in opposition to the jurisdiction of the district court to assess

damages are New York v. Brown, 179 N. Y. 303; Chicot Lumber Co. v. Dardell, 84 Ark. 145, and Dodson v. Butler, 101 Ark. 416.

In the first case Brown occupied a pier on East River under a revokable license from the city and an agreement to pay a stipulated rental. The commissioner of the docks revoked the license and notified Brown that the use of the pier for dumping was illegal. He commenced an action to restrain the city from interfering with the occupancy, which was dismissed on hearing. Afterwards the city sued him at law for the use and occupancy of the pier. The court held that the damages for the use and occupancy did not arise out of the granting of the injunction, and was recoverable in an action at law. The courts of New York have steadily adhered to the rule for which we are contending. In Chicot Lumber Company v. Dardell, the plaintiff had taken possession of and converted property of the defendants, who filed a cross bill in the case asking for damages for the property so converted, and the court held that the fact that there was an injunction which may or may not have aided the Lumber Company in making the conversion would not prevent the defendant from recovering the value of the property which, the court said, was a purely legal right arising in an equitable suit. Dodson v. Butler supports our contention. It was a proceeding for restitution under a judgment that

had been reversed on appeal. The court said at page 420:

> "The court, by its own act having occasioned wrong by the rendition of an erroneous judgment, has the inherent power by summary proceedings to afford redress to the injured party. The redress to which the aggrieved party is entitled is the restitution of the specific property which he has lost by the enforcement of the erroneous judgment, if that can be done. It is the duty and legal obligation of the party to the action securing such property to make restitution upon a reversal of such erroneous judgment; and the court, having jurisdiction of the subject-matter and of the parties, has ample authority to enforce the performance of that duty."

It is manifest that all rates charged by complainant for the transportation of freight and passengers in excess of the commissioners' freight rates and the statutory passenger rates were the result of the order suspending and enjoining the enforcement of those rates. It follows that the right of shippers and passengers to the refund of the excess is an incident to the decree of dismissal, and therefore the district court was authorized to direct an account to be taken of the damages sustained by the parties in interest with the view of requiring refunds to be made as contemplated in the original order granting, and the later order of the court modifying, the injunction. And having taken jurisdiction for that purpose its authority was exclusive.

The learned counsel quote language from the opinion in the case of State of Missouri *ex rel* Barker v. C. & A. R. R. Co., 216 Fed. 562, and say the quotation states their position exactly. Doubtless so. But the case has no bearing on the questions involved in this proceeding. It was a suit brought by the State of Missouri, on the relation of the attorney general, to recover excess charges while the injunction in the Missouri cases were in effect, and removed by the defendant to the Federal Court. But in that case the court which granted the injunction had not undertaken to assess the damages and it was, therefore, open under all the authorities for the shippers, or whomsoever was authorized to represent them, to proceed in other jurisdictions. Counsel comment on the reference to the case of Horton v. Myers, 108 U. S. 149, contained in our original brief, in a way that indicates that they do not understand the purpose for which the case was referred to. The question decided in that case is not involved in this, and the reference was only made for the purpose of illustrating the proposition that the District Court had jurisdiction of the ancillary proceeding on the ground that it involved a Federal question, namely, the construction of the effect of the final decree rendered in the main case. The proper interpretation of the provisions of the decree, however, do not arise in this proceeding, and

we have not intended to discuss it, or do more than call attention to the fact that a Federal question was involved.

Respectfully submitted,

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EDW. J. WHITE,
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In the Supreme Court
of the
United States

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,

Appellant,

v.

WILLIAM F. McKNIGHT, J. SAM ROWLAND and GEORGE W. BELLAMY, as Railroad Commissioners, State of Arkansas; JENNIE M. GALLUP, as the Executrix of Howard H. Gallup, Deceased, and WILLIAM J. METCALF,

Appellees.

No. 183

BRIEF ON BEHALF OF THE APPELLEES.

STATEMENT OF THE CASE.

This is an echo and grows out of the case of *Allen, et al., Railroad Commissioners of the State of Arkansas, v. the St. Louis, Iron Mountain & Southern Railway Company,* decided by the Supreme Court of the United States June

16, 1913, and known as the Arkansas Rate Cases, 230 U. S. 553.

After said cases were reversed by the Supreme Court of the United States, Judge Jacob Treiber, the Honorable Judge of the District Court for the Eastern District of Arkansas, made an order retaining jurisdiction of said cases, for the purpose of assessing damages sustained by shippers during the pendency of the injunction (see printed Record pp. 48 and 49, as printed in appellant's brief, pp. 2 and 3).

Afterward Howard H. Gallup commenced his action in the Baxter Chancery Court against the St. Louis, Iron Mountain & Southern Railway Company, to recover overcharges for excess freight and passenger fare collected from him from the time the Arkansas rates were suspended by the injunction granted in said cases, until they were restored after the reversal of said cases by the Supreme Court of the United States; that is, from September 3, 1908, to July 18, 1913. The Railway Company immediately made application to the United States District Court for an injunction restraining Howard H. Gallup from prosecuting said suit, then pending in the Baxter Chancery Court of Arkansas, on account of the claimed overcharges in freight and passenger rates, and also restraining William J. Metcalf and all other

persons and corporations from instituting similar suits, said application and supplementary complaint being found at printed Record pages 50 to 56.

William J. Metcalf was included as a defendant, appeared and filed his motion to dismiss; said motion is found at printed Record page 56.

And Howard H. Gallup appeared and filed his motion to dismiss the supplementary complaint and filed also his answer, the same being found on printed Record pages 57 to 59.

Jurisdiction of the court below was not asserted because of diversity of citizenship or because of other express statutory grounds of jurisdiction, but only because it was deemed that Federal District Court had jurisdiction because the proceeding for injunction was ancillary to the suit in that court wherein the original injunction was issued against the Railroad Commissioner of Arkansas, which injunction was reversed by this Court (230 U. S. 553), restraining certain railroad rates on intrastate traffic.

The case was heard by the District Court as upon motion for judgment on the pleadings, operating as a summary demurrer and decree was entered, making the temporary injunction permanent against Howard H. Gallup and William J.

Metcalf and the Board of Railway Commissioners in the State of Arkansas.

The defendants in said supplementary proceedings appealed from this decree to the Circuit Court of Appeals and the decree as entered by the district court was reversed and the action of the Court of Appeals reversing said decree has been appealed from by the St. Louis, Iron Mountain & Southern Railway Company, and the reversal of such decree is assigned for error.

In reversing the decree of the district court, the Court of Appeals by District Judge Amidon said:

"A hearing was had and the court rendered its decision as follows: 'A perpetual injunction is granted restraining these defendants and all other persons similarly situated from instituting or maintaining any suits for excess charges collected by the complainant during the pendency of this injunction.'

The defendants Metcalf and Gallup appealed from that order.

The order is too broad. The court had jurisdiction of all liabilities arising out of the bonds made pursuant to its orders. It could appoint a master before whom all claims based on those orders should be heard, and restrain actions in other jurisdictions to collect such claims. The bonds were judicial. The orders requiring them

to be given retained the jurisdiction of the court to ascertain and enforce liabilities arising from them. That power probably existed independently of such reservations.

Russell v. Farley, 105 U. S. 433;

In re Louisville, 231 U. S. 639;

In re Engelhard, 231 U. S. 646;

Louisville v. Cumberland Telephone Co., 231 U. S. 652.

This, however, was the measure of the court's jurisdiction. Parties from whom excessive rates had been exacted were not confined to suing on the bonds. They also had the right given them by law to recover the overcharges. That right was not destroyed by the injunction but was simply suspended. As soon as the injunction was out of the way, the right and remedy for its enforcement stood the same as if the injunction had never been issued.

Neither can the order be sustained on the ground of preventing multiplicity of suits. The rights of each shipper or passenger, in case he relies not on the bond but on the statute, arise out of an independent contract, and there is no community of right or interest, such as is necessary to support jurisdiction in equity for the purpose of preventing a multiplicity of suits.

Hale v. Allison, 188 U. S. 56, 72, *et seq.*;

United States v. Bitter Root Development Company, 200 U. S. 451.

The order of the trial court is modified so as to restrain only such actions as are brought on one or both of the bonds."

ARGUMENT.

I.

When the mandate of this court was received by the district court, reversing the case of Allen against the Railway Commissioners, and directing a dismissal of the case without prejudice, the court instead of entering said order of dismissal, retained jurisdiction for the purpose of assessing damages on the injunction bonds. This action on the part of the court seems to have been over the objection of the Railroad Company, and the record is silent as to whether the Railroad Commissioners of Arkansas objected, or merely acquiesced, but for the purposes of this case their action is of no consequence. The appellants on page 4 of their brief, quoting their supplemental complaint, allege that the action of the court was at the election of the defendants in the main case. The record of the court is that it was on "its own motion." The difference between consent and election or coercion is fully illustrated by the cases:

In re Moore, an Infant, 209 U. S. 490;
Ex parte Wisner, 203 U. S. 449.

Insert

Since the printing of this brief the Hon. Morris M. Cohn of the Little Rock Bar, who appeared, with others, as *amicus curiae* in the trial before the Honorable District Court at Little Rock, in a letter dated December 26, 1916, suggests:

> "Amongst other things we notice that Mr. Moore has undertaken to call in question the jurisdiction of the Court of Appeals in your case (see page 10 of his brief). He does not, however, seem to have saved this point in his assignment of errors. (See his brief, pages 8 and 9.)"

In the preparation of the brief by the appellees this question not having been raised in the Circuit Court of Appeals at St. Louis nor by the assignment of errors in this court, I deemed it to have been waived.

In re Moore, an infant, 209 U. S., 409.

The original case was properly appealed to the Supreme Court of the United States and there reversed. Jurisdiction of this supplementary proceeding is claimed by the Federal Court only because it had jurisdiction of the main case, and for no other reason, but because the principal case in which the primary controversy was litigated was properly appealed to the Supreme Court is no reason why all subsidiary questions arising in ancillary or supplementary proceedings would be appealable to this court. There were other questions involved than that of the jurisdiction of the Federal Court, which we desired to have passed upon by the Federal Court of Appeals, and we confidently submit that the case was properly appealed to the Federal Court of Appeals.

> See ~~section~~ 26, United States Statutes, 827; section 4, sec. 5 as amended, 29 U. S. Statutes, 492, and 20 U. S. Stat., section 6, 828.

The following authorities will throw light upon the proposition:

> "The jurisdiction of the court is not drawn in question by the denial of the right of the plaintiff to the judgment entered in his favor, nor in the authority of the court to enter the judgment put

in question, and therefore, an appeal can not be taken from the Circuit Court to the Supreme Court."

Woodbridge and Turner Eng. Co. *vs.* Ritter, 70 Federal, 679.

"When a final judgment or decision has been rendered in the District Court involving both questions of jurisdiction and other questions the party against whom it is rendered may elect to take his writ of error to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals on the whole case. When he chooses the latter, the Circuit Court of Appeals has jurisdiction to determine the jurisdiction of the court below, as well as all other questions in the case."

Rust *vs.* United Water Works Co., 70 Federal, 129.
B. & O. Ry. Co. *vs.* Meyers, 62 Federal, 367.
Am. Sugar Ref. Co. *vs.* Johnson, 60 Federal, 503.
T. and P. R. R. Co. *vs.* Bloom, 60 Federal, 979.
King *vs.* McLean Asylum, 64 Federal, 225.
United States *vs.* Jahn, 155 U. S., 109.
Robinson *vs.* Caldwell, 165 U. S., 359.

"If an appeal is taken to the Circuit Court of Appeals and the whole case has been determined on its merits, an apppeal can not be taken direct from the Circuit Court on the question of jurisdiction."

Robinson *vs.* Caldwell, 165 U. S., 259.

Under the statute and these decisions we have concluded that the decision of the Circuit Court of Appeals in this case was final, and that the appeal by the appellants to this court is not allowable, and we now move to dismiss this appeal by the appellant because this court has no jurisdiction to hear and determine the same.

McHenry *vs.* Alfred, 168 U. S., 651.
The Bayonne, 159 U. S., 687.
Ansbrow *vs.* U. S., 159 U. S., 695.
Chappell *vs.* U. S., 160 U. S., 499.

We submit that this court is without jurisdiction to hear and determine this case.

II.

It is the theory of the impleaded defendants in the supplemental proceeding, that they were not parties to the original action for injunction by the Railroad Company against the Railroad Commissioners, and the only effect of the injunction granted in the original case was to tie the hands of the State *pendente lite* from enforcing its law, or rather the effect of the law was suspended by the injunction. Neither Gallup nor Metcalf, nor any other shipper had any interest in the bond and could not recover thereon in an action.

Hayes v. The Fidelity Co., 112 Fed. 872.

Upon the dissolution of the injunction, Gallup was free to bring his suit in any court he desired. It is a familiar rule that the court that first acquires jurisdiction retains it, and its jurisdiction cannot be interfered with by any other court, either state or federal. And, by express statute, the federal court is forbidden to stay or interfere with proceedings in the state court.

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in a state court, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

Rev. Stats. Sec. 720.

Of course the application of this statute to this case depends on the question whether the jurisdiction of the district court, when it assumed jurisdiction over the original case, had before it every citizen in Arkansas, and particularly Gallup and Metcalf, and had jurisdiction over them for all purposes and as fully as though they had been named as defendants in the bill of complaint and had been served with summons. If they were such parties, then this statute, Sec. 720, is applicable; if they were not, then such statute is a complete defense to the action for injunction in this case, as granted by the district court at Little Rock.

So far as the record shows, Gallup was never in court in these rate cases until he commenced his action in the Baxter Chancery Court to recover his overcharges for freight and passenger fare. A plaintiff is in court when he files his complaint, but a defendant is not in court until he has been served with process, then by the *doctrine of relation* the action is pending from the *teste* of the writ as to all defendants actually served with that writ. If a defendant named in the writ is not served, hanging the writ, then the action is not pending as to that defendant. An alias writ may issue, but the doctrine of relation only operates from the *teste* of the writ

actually served on the named defendant, whether it be an original, an alias or a *pluribus*.

Gallup was not named in the original injunction suit, was never in court in that case, and was in no manner bound thereby. If the original case had been decided in favor of the Railroad Company by the Supreme Court of the United States, the defendants in the supplemental proceedings would have been bound thereby, not upon any doctrine of former *adjudication* or *res adjudicata,* (and they could have commenced or prosecuted an action, as Gallup did, without fear of contempt for violating the injunction order), but they would have been bound by that decision by reason of the ancient and venerable doctrine of *stare decisis,* which would have defeated his action in any court, either state or federal. Gallup was not a party to that action, was in no manner bound thereby, except, had the statute been declared unconstitutional by the Federal Court, a demurrer would have been sustained to his complaint in any court in which he may have filed it.

As the cases were decided against the Railroad Company, Gallup is not bound in any manner and can prosecute his suit in any forum he desires. This phase of the matter is fully discussed by District Judge Parker in

> *Kansas City Southern Railway Company v. Quigley,* 181 Fed. 190, and cases cited therein.

In this case Judge Parker holds that the reason persons who are not parties to an action are not bound is, that they are not parties, and that the action of a court cannot bind persons who are not parties to the action and have not been served with process.

Let me illustrate: Suppose the rates had actually been put in operation by the Railroad Commissioners of Arkansas, and the railway companies had refused to comply with either the statute or the order of the board fixing the rate, and Bellamy as an individual had brought suit against the Railroad Company for damages, and the statute had been declared unconstitutional and the order of the board confiscatory. Then Gallup had brought his action. Gallup certainly would not have been bound by the decision in the Bellamy case as a former adjudication; but the doctrine of *stare decisis* would have defeated his action. So had the decision of the Supreme Court of the United States been in favor of the railroad company, and the original case been affirmed, Gallup would not have been bound by such judgment as a former adjudication because he was not a party, but the action brought by him would have been defeated because the statute being unconstitutional or because the order was invalid and inoperative, as declared by the court in the first case, and would have been followed

by the court in the case brought by Gallup under the doctrine of *stare decisis,* and a recovery by Gallup would not have been allowed. Now Gallup not being a party to the action and the railroad being defeated, he is not bound in any manner and he is at liberty to pursue his remedy in any forum he desires or chooses.

Upon the reversal of the decree of the district in the original case by the Supreme Court of the United States and the state's hands were untied and the laws of the state were given operation and put in force. Then by the doctrine of relation they were in the same condition as though such laws had never been suspended and were in force as from the date of their suspension when they would have continued in force had their enforcement not been suspended by the injunction, and the defendant Gallup, in common with all other citizens of the state who were also shippers on the railroad, had a right to recover the illegal exactions or overcharges for freight and passenger fare on intrastate business *pendente lite* in actions brought for that purpose. Mr. Gallup, the respondent or impleaded defendant, commenced his action in the state court in the county of his residence, and in which he caused process to be served on the appellant, the St. Louis, Iron Mountain & Southern Railway Company.

It is our contention:

First—That the action by Mr. Gallup was properly brought in the Baxter Chancery Court and that the federal court was without jurisdiction to stay the prosecution of the action.

Second—The damages claimed for overcharges are not properly assessable as damages against the penalty of the bond.

Third—The persons named in the bond and they only, can have any claim for damages on or against the bond. That is the actual defendants in the action, the Railroad Commissioners of the State of Arkansas.

Fourth—Overcharges for freight and passenger fare are not damages within the purview of the bond, but arise by reason of the wrongful act of the railroad company in the collection of such overcharge.

Fifth—No damage can be allowed on or against the bond after the temporary injunction had been made permanent and pending the appeal, as such charges thereafter were permitted not by the operation of the bond but by and on account of the effect of the judgment.

Sixth—Howard H. Gallup cannot recover on the bond and his only remedy is his action to recoup by recovering the overcharge in the action in the same manner as though the overcharge had been made and no injunction had ever been granted.

A.

RULES.

The appellant on page 3 of its brief cites Rule 5 of the trial court as the reason for the court's order as well for retaining jurisdiction and appointing a master, as for the injunction order against the appellees. Courts cannot legislate, and the district court can no more extend its jurisdiction by its own rules than a man "taking thought can add one cubic to his stature." (Mathew VI, 27.)

"The making of rules," said Mr. Justice Valentine, "borders very closely to being an act of legislation and is to be tolerated rather than encouraged, and courts can only make rules in a few cases for the orderly transaction of business, and where they (the courts) are clothed with discretionary power. Citing Mr. Justice McLean in *Watkins v. Coleman*, 16 Pet. 60 and 61."

Coleman v. Newby, 7 Kansas 91, per Valentine.

III.

PERSON NOT A PARTY.

Mr. Gallup was not a party to the original action of the *Railroad Company v. The Arkansas Commissioners*, and when the statute fixing the passenger fare at 2 cents a mile was held valid and binding on the railroad company, as was also the freight rates fixed by the railroad com-

missioners, he commenced, as he had a right to do, his action against the railroad company for his overcharges. If he was not a party to the action, and the federal court had not prior jurisdiction, (and we contend that it had no such prior jurisdiction), then section 720 prohibits the federal court staying the action in the state court.

If Gallup was bound by the judgment or order of the federal court retaining jurisdiction for the assessment of damages, why was he not made a party to the suit, and the bond be the basis of the recovery?

If the injunction in the original suit had been sustained, then to a certain extent the Railroad Commissioners would have represented the interest of the shippers, and they would have been bound, not on the principle of *res adjudicata*, but on the doctrine of *stare decisis*.

But the bill being dismissed, the shippers could not be represented by the railroad commission, as their interest in each case is varied.

Again, neither the state nor the commissioners were damaged by the collection of the illegal rates, either freight or passenger, by the railroad company. It was only an individual damage, and can be recovered only by the individual sustaining the damage.

Phillips v. Amalgamated Association, 208 Fed. 335.

The first question that presents itself even on the theory that Gallup is a party and is bound by the doctrine of *res adjudicata* is, had the court power to retain the case and compel the shipper to appear in his court and make proof of his damage? This question first came before the Supreme Court of the United States in the case of *Bein v. Heath,* 12 Howard 168, when an attempt was made to have the United States Court follow the practice of a state court, the state in which the case arose from whose court the case was removed to the federal court, and the Supreme Court of the United States, says:

"The obligor in an injunction bond given in proceedings in the United States courts will not be subjected to state laws in fixing his liability upon the bond, and though the state practice permits the assessment of damages and the entering a decree thereon against the obligor immediately upon the dissolution of the injunction. Such practice will not be recognized in the United States courts."

Bein v. Heath, 12 Howard 168.

There is a case decided by the Supreme Court of the United States that on first blush seems to conflict with the doctrine enunciated in *Bein v. Heath,* and this is the case of *Russell v. Farley,* 105 United States 443, which seems to be relied upon by appellant, and which the Honorable Judge

Jacob Treiber had in mind and on which he based his decision in granting the injunction in the supplemental proceedings, in which Howard H. Gallup is impleaded. This case, however, when examined, shows there is no real conflict.

The case of Russell against Farley, the injunction was granted on the application of a receiver appointed by the United States Court. Now it is well understood that courts in the decision of cases deal only with the case and the facts and the law governing, that is before them, and a case is not an authority unless the facts are analogous.

In *Bein v. Heath* the action was by an individual in his individual capacity. In *Russell v. Farley* the action was by a receiver duly appointed and acting under the order of the court, and acting in his representative capacity at the direction of the court appointing.

It has always been the practice of courts of equity to allow their receivers to be sued only in their own court, and they have a discretion to deny permission to sue the receiver in any and all cases. So in that case the court well says:

> "The allowance of damages was so nearly discretionary that the case would not be reversed."

But it was not on account of any equity principle except the right of the court to protect its receiver that the case was retained and damages denied by the court on the bond on the dissolution of the injunction.

So that under *Bein v. Heath* 12 How. 168, the equity courts of the United States have no power to retain jurisdiction of the case and assess damages by reason of the wrongful granting of the temporary injunction as between the parties and the principles of this case have not even been modified by *Russell v. Farley,* and the extension by some of the United States district courts of the supposed doctrine of the case of *Russell v. Farley* is wholly unwarranted.

The power did not exist under the old English chancery practice, and the statement in *Russell v. Farley* as to the English chancery practice had reference to suits against receivers and not to the practice of retaining jurisdiction to assess damages against the bond.

In *Phelps v. Foster,* 18 Illinois 309, Mr. Justice Caton said:

"I have with considerable reluctance come to the conclusion that the court exceeded its power in awarding damages to the defendant and against the complainant, except in the case of an injunction to restrain a judgment at law (a purely statutory provision of the State of Illinois) I can find

no warrant in the statute for awarding damages upon the dismissal of an injunction bill, and *I cannot find authority for sustaining it in the practice of the English courts of chancery.* (The italics are ours).

The general principles of equity jurisdiction are against it. It is granting affirmative relief to the defendant without a cross bill and when the pleadings do not justify it."

Phelps v. Foster, 18 Illinois 309.

In some states this practice is allowable. In Alabama the legislature has given the Supreme Court power to make rules to govern the equity practice, and a rule has been made allowing this practice.

In Vermont and some other states the power has been expressly given by statutory enactment, but in all these states the courts hold that the power of the court of equity to retain the case and assess damages against the bond as a remedy is purely cumulative and not exclusive and is at the option of the defendant and not of the plaintiff in the injunction.

Surgis v. Knapp, 33 Vt. 486;
Edwards v. Pope, 3 Scam. 465;
Roberts v. Bent, 4 O. S. 502.

In the case at bar the railroad company seems to be praying that relief be granted to

the defendants and others not parties to the suit, and compel such parties to litigate the damages that might have accrued to them during the pendency of the temporary injunction, whether they want to or not, and to prevent by injunction any litigation to recover the unlawful overcharge while the permanent injunction was in force, and to prevent recovery at all in any court. In other words the railroad company, after having unlawfully exacted millions of dollars from the people of Arkansas now seeks to prevent being compelled to disgorge, by an injunction against the recovery of any part of the illegal exaction after the final decree making permanent the temporary injunction, and to all exactions during the pendency of the temporary injunction, compelling the litigation at a place (Little Rock, the capital of Arkansas) so distant from the homes of the majority of the shippers as to render litigation for the small amounts an impossibility and this not with any desire that justice may be done, but with the full intent to defeat it.

There is no receiver in this case to be protected, each citizen of Arkansas is sovereign and can choose his own forum and his own remedy for the violation of his rights. When Christ was here on earth he intimated to the Jews that they were slaves, and they retorted that they were the "children of Abraham and had never been in

bondage." The citizens of Arkansas do not need a railroad company that has filched by unlawful exactions millions of dollars from them in the last five years, to act as their guardian. They think they are capable of electing and pursuing their own remedy in the forum of their home county, where justice can be had as in the old English courts of justice, "for the asking." The railroad company is in the position of saying: "I've tagged you, but you can't tag me, I've my fingers crossed."

IIIA.

It may not be amiss at this place to call the attention of the court to the Missouri rate cases, reported in the Supreme Court Reporter in Vol. 33, pages 976 to 984. After the reversal of these cases the matters came before Judge Smith McPherson for entry of the mandate of the Supreme Court of the United States, and an attempt was made to get him to retain jurisdiction of the cases under an order similar to that made in this case by Judge Treiber (see printed record, p. 58). The opinion of the Honorable Judge sitting for the Western District of Missouri at Kansas City, on January 30, 1914, is printed in the Federal Reporter, Vol. 210 at page 902. In that case while the court retained jurisdiction of the case, he made it optional with any party

from whom illegal exactions had been collected during the pendency of the injunctions to make claim in his court or bring a separate suit, as they desired, and might elect. So we have today in our circuit two rules in two adjoining states. In Arkansas parties aggrieved are enjoined from resorting to the state courts for their redress and in Missouri they are permitted to exercise their option.

We insist that the rule laid down by Judge Smith McPherson is the correct course of procedure, the railroad companies consenting that the court may retain jurisdiction for that purpose. In Arkansas the Honorable Judge made the order of his own motion (Printed Record p. 58).

The fact that he invoked rule 15 does not make the matter any more valid and binding. If the equity courts of England had no such power, and this power has not been conferred by statutory provision, then the court could not confer such power on itself by the rule (the said rule is found in printed Record pp. 76 and 77). If such rule is "among the rules of the circuit and district courts of this circuit," then such rule would have been binding on Judge Smith McPherson as well as upon Judge Treiber, and as any such rule is disregarded by Judge McPherson it was error for Judge Treiber to follow it as a rule of procedure.

IIIB.

Nor will the fact that the Honorable, the District Judge, erroneously concluded that the difference between the rates fixed by the laws of Arkansas and those continued in force by the railroad company during the continuance of the injunction, would or could be included in the penalty of the bond given at the time of the granting of the temporary injunction and would be damages within the purview of the law making provision for the giving of such bond, alter the case, as the appellant Howard H. Gallup was not a party to that action and has no interest in the bond given therein. The bond could cover only the damages allowed by the usages of the chancery court of England or such as are provided by the acts of Congress, and we contend that the excess or overcharges is not within the penalty of the bond.

IIIC.

The right of Gallup to recover for the overcharges in his suit in the Baxter Chancery Court does not flow from the injunction, but is an action in the nature of *assumpsit*, as for money had and received, brought in the chancery court, because an accounting is necessary to fix the amount of recovery. The railroad company has collected more freight and passenger fare from the ship-

per than it was authorized to collect. And the difference between what it was authorized to collect and what it did collect is in its treasury, but belongs to the shipper from whom it was collected. The situation has all the essentials to support an action as for money had and received.

"*Assumpsit* will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice in equity to refund.

The form of their indebtedness or the mode in which it was incurred is immaterial."

Bone et al., Trustee, v. United States, 93 U. S. 642.

In other cases cited in 2 Enc. U. S. Sup. Ct. Rpts. 641. Also:

Cory v. Curtis, 3 Howard 236;
Swift etc. Co. v. U. S., 111 U. S. 232;
Lonergan v. Buford, 148 U. S. 241;
Lanborn v. Board of County Commissioners, 97 U. S. 181.

In this case the St. Louis, Iron Mountain & Southern Railway Company is a corporation organized under the laws of Arkansas, and the district court had no jurisdiction of ordinary litigations between it and the citizens of the state of Arkansas.

However, the shippers had many rights other than those measured by the bonds in the injunction case, and they have the same rights without the bonds that they have with the bonds, that is, they have an action for money had and received.

New York v. Brown, 179 N. Y. 303, (72 N. E. 114);

Chicot Lumber Co. v. Dardell, 84 Arkansas 145.

IIID.

Judge Treiber in his opinion (on printed Record p. 69) says:

"Suppose the court when it granted the temporary injunction had required the railroad company to deposit in the registry of the court all the excess charges to be there impounded until the final determination of the cause, can there be any doubt of the power of the court in that case to have enjoined the shippers from maintaining independent suits in other courts for the recovery of such excess charges?"

There is a vast difference between having the money in the registry of the court and requiring the parties to interplead for the money, and having a bond in which they have no interest. And not a single case can be found anywhere to sustain such a contention. The two cases are not analogous.

IIIDa.

The cases *in re Englehard & Sons company*, 231 U. S. 646, and *in re City of Louisville*, 231 U. S. 639, deal with the situation supposed by Judge Treiber, and hold the claimants were parties to the suit to the extent that they could take advantage of the terms imposed on the issuing of the injunction. However, in that case the claimants would not have had a right of action for the money that had been collected from them, as it was collected by virtue of the injunction, and was not held by the telephone company, so that an action for money had and received would not lie. The terms imposed were that the funds should be paid into court, and later that they should be segregated and held apart by the telephone company, and paid into court when ordered. The situation was such that the telephone company held the fund as trustee or depository for the court, and its answer to an action of *assumpsit* would have been that it had no control of the fund, but that the control was in the court. Here the situation is materially different if the shippers have any remedy against the bond (which we do not concede), the railroad company does not hold a fund subject to the orders of the court, as these terms were not imposed, but the status of the railroad company is that it gave bond to pay to the claimants the amount due them, not

to exceed a specified amount. The railroad company is a debtor to the shippers under two separate obligations—one in a limited amount under the obligations of its bond, the other in the amount that it holds for any individual shipper under the rule that it should not hold the money which it does hold and has no claim to.

Suppose in this case, as in the Missouri rate case, that a bond for only $10,000 had been given, the overcharges amount to more than $1,000,000. Would the shippers then only be entitled to recover their overcharges from the bond? If the bondsmen had become insolvent, would the shippers still be required to look to the bonds for *recoupment?* It seems clear that after the decree legalizing the higher rates had been reversed and held to be erroneous, the shipper would have the right to recover the difference between those two rates in an action in the nature of *assumpsit* as for money had and received in any court having jurisdiction of the parties and the subject-matter of the litigation. The action of the shipper is an action for restitution for money coerced from him under the reversed decree and this money, it seems clear may be recovered in an independent action.

New York v. Brown, 179 N. Y. 303, 72 N. E. 114;

Chicot Lumber Company v. Dardell, 84 Ark. 145;

Dodson v. Butler, 101 Ark. 416.

The nature of the action by the shippers to recover the overcharge is concisely stated by Judge Van Valkenburg in the case of the *State of Missouri ex rel. Barker v. C. & A. R. R.,* 216 Fed. 562.

P. 564-(1): "The briefs have been read and attentively considered. I am clearly of the opinion that no federal question is involved. The suits are not brought on the bond, nor for any damage accruing from the injunction, as such. They merely seek to recover alleged overpayments of rates and charges made under practical duress and in violation of the terms of what has now been adjudged to be valid state regulations. Litigation of the same or similar questions, or of rights growing out of adjudications in federal courts, is not confined to federal jurisdictions. In this connection it has been suggested that 'pleading by plaintiff of the maximum rate statutes of Missouri,' raises a federal question, etc." * * * "but such is not the case."

The above states our position exactly. Gallup did not sue on the bond, nor for any damage accruing from the injunction as such, but did seek to recover the overpayment of rates and charges made under practical duress and in violation of the terms of what has now been adjudged to be a valid state regulation. If shippers have the right to sue in the state courts in Missouri to re-

cover the overcharges growing out of the rate cases in that state, why have we not the same right in Arkansas?

If this litigation involves no federal question in Missouri, how does it involve a federal question in Arkansas? If it is not within the federal jurisdiction in Missouri, how is it within the federal jurisdiction, and exclusively so, in Arkansas?

IV.

The liability upon the injunction bond is limited to such damage as arises from the suspension or invasion of the vested legal rights by the injunction. Speculative or remote damages are not allowable nor are those which are merely consequential. The limit being such damages as flow directly from the injunction as its immediate consequence.

Stewart v. State, 20 Md. 92;
Morgan v. Megley, 53 Pa. St. 153;
Brown v. Jones, 5 Nev. 374;
Collins v. St. Claire, 51 Ill. 328.

Only damages can be recovered that are such as arise from the operation of the injunction itself, and not such as are occasioned by the suit independent of the injunction itself.

Burgen v. Sharer, 14 Monroe 497.

In a case where the collection of a claim was enjoined and the temporary injunction was afterwards dissolved, it was held the amount of the claim could not be recovered on the bond even though the statute of limitation bar during the litigation.

Duncan v. Davis, 37 Ala. 95.

The injunction in the original case only stayed the state of Arkansas and prevented its executive officers from enforcing the laws of Arkansas as to freight and passenger rates during the pendency of the injunction, but the granting of the injunction did not vest any right in the St. Louis, Iron Mountain & Southern Railway Company to collect the illegal rate which it did collect, and such collection was an independent tort or crime (certainly an unlawful act, and the injunction being in force did not make it lawful), and was not the natural and proximate consequence of the injunction, except as the order prevented the state from enforcing its law.

Ashley v. Morrison, 1 Esp. 48;
Vickers v. Wellocks, 8 East 1;
Patterson v. Kingland, 8 Blatchford 278.

To the same effect is:

Lacy v. Taylor, 24 Md. 282;
Meysenberg v. Schlieper, 48 Mo. 426-440.

Also:

Brandanour v. Treat, 45 Ill. 372;
Ruben v. Stephen, 25 Miss. 253.

It has been held that where a suit or execution at law is stayed by injunction the claim or judgment cannot be recovered as against the bondsmen, nor can the interest, unless the plaintiff has in the meantime become insolvent.

Berley v. Heath, 45 N. M. 524;
Budderberger v. McDaniels, 38 Mo. 138;
Tyron v. Robinson, 10 Rich. L. 160;
Willet v. Scovill, 4 Abb. 405;
Edwards v. Pope, 4 Ill. 465;
Aldrich v. Reynolds, 1 Barb. ch. 613;
Kennedy v. Hammond, 16 Mo. 341.

In *Lane v. Hitchcock,* 11 Johns 213, the court says:

"Proof was offered at the trial (for recovery on the bond) that the mortgagor was insolvent and had no other property than the mortgaged premises out of which the debt could be satisfied. As this was not pleaded, to allow this proof without averment was to take the defendant (the bondsman) by surprise."

Where damages are decreed on the dissolution of an injunction the court cannot go beyond

the bond and award greater damages than the penalty fixed in the bond.

Sturgis v. Knapp, 33 Vt. 486.

Where the sale of property under a judgment is enjoined and afterwards the temporary injunction is dissolved, the surety on the injunction bond will not be subjected to the payment of the judgment if the collection of the judgment was not enjoined.

Hood v. Trimbal, 1 Lit. 413;
Portsmouth et al. v. Byington, 12 O. S. 114;
Teaff v. Hewitt, 1 O. S. 511.

The measure of damages on the bond is the real loss to the defendant, that which he actually incurred, with costs and not the amount of the execution.

V.

We now come to the question of the liability of the bondsmen for damages to the plaintiff after the temporary injunction had been made permanent. The answer of Gallup alleges (printed Record p. 58):

"Said temporary injunction having been made permanent on the 11th day of May, 1911, but vacated July 18, 1913, after the case had been reversed by the Supreme Court of the United States,

and was ordered to be dismissed without prejudice on June 16, 1913, and this respondent says that the greater part of the said overcharges sued for in his said action were unlawfully collected from him after the temporary injunction was made permanent and between said time, to-wit, May 11, 1911, and the dissolution thereof on July 18, 1913."

Sureties on a bond given on the granting of a temporary injunction are not liable for damages after the injunction has been made perpetual, although the decree has been reversed.

Weber v. Wilcox, 45 Cal. 301.

See also:

34 Cal. 270 and 80 Cal. 611 (22 Pac. 327).

This identical question was before the Supreme Court of the United States at the October, 1907, term, in the case of *Houthon Mifflin & Co. v. Cortelyou,* as postmaster general of the United States and reported in 208 U. S. 154-157, and it was there held that the bond was liable only during the hanging of the temporary injunction, that after the decree the damages were caused by the decree and not by the temporary injunction, hence the bond was not liable, as even though no temporary injunction had been granted, yet if the action had been prosecuted to a final judgment the injunction would have been operative with-

out the bond, hence the bond was liable only until the taking effect of the permanent decree, and this even though such decree were afterward reversed.

Woodson v. John, 3 Mun. 230;
Jetter v. Langham, 5 Grat. 193.

See also:

Houghton v. Meyer, 208 U. S. 149.

Counsel for the complainant admit in their complaint that we are correct in our contention that we could not, even were we parties to the original injunction suit, recover against the bond for damages accruing after the temporary injunction had been made final, but they do go a step further and say that we could not recover against them in a direct suit. They allege (printed Record p. 55):

"Complainant says that the final decree entered in the aforesaid cause on the 11th day of May, 1911, hereinbefore referred to, it was ordered that the bond for injunction filed by the complainant be released and the sureties thereon be discharged from further liability under said bond and preclude any recovery of damages on said bond or by reason of or growing out of the injunction ordered in the aforesaid cause. Complainant avers that upon the rendition of the final decree in said cause perpetuating and making the temporary injunction theretofore granted permanent, said bonds ceased by operation of law to have any effect, and complainant is

not liable for any damages that may accrue to any passenger or shipper after the rendition of the final decree making the temporary injunction permanent."

In other words, with the appellants it is a case of "heads I win, and tails you lose."

Let us illustrate: Suppose that Gallup, as alleged by him in his complaint, had paid $6,000 overcharges and that two-thirds of this, or $4,000, was paid during the interval between the decree of the circuit court making perpetual the preliminary injunction and its reversal by the Supreme Court. Under the holding of *Houghton, Mifflin & Co. v. Cortelyou,* 208 U. S. 154, see also *Houghton v. Meyer,* 208 U. S. 149, would the shipper be without a remedy? Would not the railroad company be in the attitude of having collected from him $4,000 under a decree reversed by the highest court of the land as erroneous and yet an action for restitution in a proper court denied him? Is the English maxim "that there is no wrong without a remedy" to be proved to not exist in America?

We agree with the allegation of counsel in that damages cannot be assessed against the penalty of the bond after the entry of the final decree, and we further contend that overcharges for freight and passenger fares cannot be assessed against the bond in any event by the shippers.

We agree that even though Howard H. Gallup had been a party to the original suit, that he could not have recovered any damage on the temporary injunction bond in the *interim* between the granting of the permanent injunction and the reversal of the final judgment by the Supreme Court of the United States. And we further contend that the overcharges for freight and passenger fare cannot in any event be recovered by shippers and passengers (of whom Gallup is one) as against the bond, for two reasons. He was not a party to that action in which the bond was given, and further such overcharges are not such damages as result from the natural consequence of the granting of the temporary injunction but are the result of the wrongful and unlawful act of the railroad company in collecting such overcharge. The granting of the injunction did not make the overcharge lawful, and when the injunction that suspended the operation of the laws of the State of Arkansas was vacated, the railroad company must make restitution.

New York v. Brown, 179, N. Y. 303.

Through no fault of the railroad commissioners representing the shippers, through no fault of the shippers themselves and only on account of an error of the court in the original proceeding, were these excess charges exacted—charges above

the legal rate, and to hold that such sum could not be recovered in an action for restitution, is a proposition to which we do not think that a court of equity will assent.

Under a somewhat similar situation the court in *Chicot Lumber Company v. Dardell,* 84 Ark. 145, said:

"The fact that there was an injunction, which may or may not have aided the lumber company in making this conversion, will not prevent Darddell having redress therefor exclusive of a possible remedy upon the injunction bond."

VI.

A MULTIPLICITY OF SUITS.

The railroad has sought to invoke the equity powers of the court and secure a sweeping injunction of a blanket nature (and as odious if it can be sustained, as the old general warrants), forbidding anyone, whether a party to the proceedings or not, from suing to recover their overcharges. On the ground that "unless this court gives relief the complainant will be sued in 'a multitude of suits.' And it would be unjust and inequitable to allow such a multiplicity of suits as would result from independent actions prosecuted against complainant."

Stating in one paragraph that the court cannot give relief on the bond after the final injunction

decree that was reversed, and in another that we ought not to be allowed to sue at all to recover the money unlawfully exacted from us.

This is the first time in the history of the law that a party that has violated the statutes of a state and the rights of its citizens a multitudinous number of times has had the "gall" to ask the interposition of a court of equity to prevent paying the penalty on the equitable doctrine of restraining "a multiplicity of suits." Now, in order to invoke the exercise of this doctrine by a court of chancery it is necessary that the suits must be between the same parties and about the same subject-matter. It is not a multiplicity of suits that the railroad companies fear, it is a multitudinous number of suits commenced and prosecuted by those from whom they have unlawfully exacted exorbitant and excessive railroad rates, both freight and passenger. But as the law guarantees to every person a speedy remedy according to the law of the land (the *lex terra*) a court of equity is powerless to aid them in this instance.

Returning to my illustration: Suppose the rates had been actually put in operation by the railroad commissioners of Arkansas and the railroad company (the appellant here in this case) had refused to comply with the statute or the order of the board fixing the rates and Bellamy as an individual had brought suit for damages against

the railroad company and all the other people of Arkansas had waited to see the outcome of the litigation and the statute and order had been sustained and declared valid (as was done in the injunction suit) and after the final judgment in that case everyone whom the railroad company overcharged brought suit, would the railroad company have been heard to come into a court of equity and enjoin the plaintiffs on account of the great multitude of suits being launched against it and be permitted, with its hands reeking and slime and its purse full of "tainted money" exacted in defiance of the laws of Arkansas, to plead its own wrong in a court of equity and ask for an injunction against such actions? If it could not do so in the presumed case and under those circumstances, can it now? The mere fact that it was protected from criminal prosecution by the injunction while it was making the exactions does not in any manner absolve it from making restitution after the litigation is over.

When the workmen went to Gallileo and told him that their pump would not work, he told them that "Nature did not abhor a vacuum beyond 32 ft." While both the law and equity abhor a multiplicity of suits, to invoke the arm of the chancery court it is necessary that the *multiplicity of suits* between the same parties and about the same subject-matter. Neither the law nor the conscience of

the chancellor is shocked when a multitudinous number of actions is prosecuted against a defendant, either civilly by individuals or by the state to redress an infinite number of crimes and the fact that unless the railroad company disgorges and pays back the money it has filched from the citizens, shippers and passengers of Arkansas, it will be sued an infinite number of times, is no more reason for an injunction in its behalf than it would be reason for a wholesale murderer or a bootlegger to ask an injunction to restrain a prosecution by the state against him.

We believe that the court of appeals in its opinion, record page 79, correctly declared the law as to a multiplicity of suits.

"Neither can the order be sustained on the ground of preventing multiplicity of suits. The rights of each shipper or passenger, in case he relies not on the bond but on the statute, arise out of an independent contract, and there is no community of right or interest such as is necessary to support jurisdiction in equity for the purpose of preventing a multiplicity of suits."

Hale v. Allison, 188 U. S. 56, 72 *et seq.;*
United States v. Bitter Root Development Company, 200 U. S. 451.

The railway company when it violates the laws of the state and outrages the rights of others is no better than any other malefactor; let it act

justly and it will not be sued an unjust number of times.

We submit that the judgment of the circuit court of appeals should be affirmed.

Respectfully submitted,

ALLYN SMITH,
For Appellees.

IN THE

Supreme Court of the United States

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY..... *Appellant*,

v. No. 183.

WILLIAM F. McKNIGHT, *ET AL*.. *Appellees*.

RESPONSE TO MOTION TO DISMISS FOR WANT OF JURISDICTION.

Referring to the addendum to appellee's brief filed with the motion to dismiss, we submit that the Amicus Curiae who advised the learned counsel that the point as to the jurisdiction of the court of appeals was waived because it was not set out in the assignment of errors, was himself badly advised, inasmuch as the facts upon which the objection is founded appear in the record.

On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not other-

wise suggested, and without respect to the relation of the parties to it."

U. C. & L. M. Ry. v. Swan, 111 U. S. 379, 382.

C., B. & Q. Ry. Co. v. Willord, 220 U. S. 413, 420.

Cases Cited in the Addendum to Appellee's Brief.

In re Moore, an Infant, 209 U. S. 490, was a suit brought by a citizen of Illinois against a citizen of Kentucky in the State of Missouri. The suit was removed by the defendant to the U. S. Circuit Court; after the removal plaintiff filed an amended complaint, and afterwards presented a petition for mandamus in this court to compel the remand of the case to the State court. The court held that as the plaintiff and defendant were citizens of different States, and within the federal jurisdiction, either party could waive the objection that the removal was not to the right district, and that both parties had accepted the jurisdiction of the circuit court, the defendant by filing the petition for removal and the plaintiff by filing an amended complaint and joining in a stipulation for continuance, after the case had been removed.

Robinson v. Caldwell, 165 U. S. 359. This case was brought in the State court and removed to the circuit court of the United States. On appeal the jurisdiction of the Circuit Court was questioned

by appellant on the ground that plaintiff could not have brought the original suit in that court, and therefore the case was not removable. The appellant prosecuted appeals to the Circuit Court of Appeals and to this court. This court held:

> "As no question of jurisdiction was certified by the Circuit Court, and as the defendant chose not to await the action of this court upon the appeal to it from the Circuit Court, but invoked the jurisdiction of the Circuit Court of Appeals upon the whole case, he must be held to have waived his right to any decision here upon his direct appeal from the Circuit Court."

McHenry v. Alford, 168 U. S. 651. In this case the Circuit Court of Appeals certified to this court six questions for instructions for the proper decision of the cause. The court held that the Court of Appeals had not complied with the rule requiring that each question present a distinct point or proposition of law clearly stated so that it can be distinctly answered without regard to the other issues of law in the case, and declined to answer the first, third and sixth questions for that reason, the first question involving the jurisdiction of the Circuit Court. The court used this language at page 659:

> "If the whole case were here upon writ of error or appeal, we should have to look into any question of jurisdiction, whether raised or not, but we are not obliged to

do so when questions only are certified to us, unless presented in proper form."

The Bayonne, 159 U. S. 687.

Ansbro v. U. S., Ibid. 695.

The first of these cases was an appeal from the District Court of the United States, the second one a writ of error from this court to the Circuit Court of the United States. In both cases the jurisdiction of the lower court was questioned, and this court declined to take jurisdiction on the ground that the question had not been properly certified under the provisions of the statute.

Chappell v. U. S., 160 U. S. 499.

This case was brought to the Supreme Court on writ of error to a District Court of the United States, without formally certifying, or otherwise specifying, a definite question of jurisdiction. The court held that the question of jurisdiction was not sufficiently certified under the provisions of that clause of the statute providing that appeals may be taken direct to the Supreme Court in a case involving the jurisdiction of the court from which the appeal is taken, but it further held that under the other clause of the statute, providing for appeals in cases in which the constitutionality of the laws of the United States is drawn into question, the court had appellate jurisdiction, and having acquired jurisdiction under that clause, it had power to dispose

not merely of the constitutional question, but of the entire case, including all questions whether of jurisdiction or merit (p. 509).

None of the cases cited have any bearing on this case, which is standing on appeal from the judgment of the Circuit Court of Appeals, under the provisions of Section 241 of the Judicial Code, granting the right of appeal in any case in which the judgment or decree of the Circuit Court of Appeals is not made final. Section 128 of the Judicial Code enumerates the cases in which the judgments and decrees of the Circuit Court of Appeals shall be final as follows: In all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states, and cases arising under patent laws, copyright laws, revenue laws and criminal laws, and in admiralty cases.

JURISDICTION OF THE CIRCUIT COURT OF APPEALS.

Neither in the main case to which this proceeding is supplemental and ancillary, nor in this proceeding, did diversity of citizenship exist; jurisdiction in the main case rested solely on the ground that the cause of action arose under the constitution of the United States.

Where that is the case the appeal lays directly to this court under the provisions of Section 238 of the Judicial Code.

In Union & Planters' Bank v. Memphis, 189 U. S. 71, 73, cited in our original brief, it was held that where an appeal was prosecuted to the Circuit Court of Appeals in a case that arose under the constitution of the United States, and had there gone to a decree from which an appeal was allowed to this court, the decree of the Circuit Court of Appeals should be reversed, not on the merits, but by reason of want of jurisdiction in that court. The court say: "If it were not so, the right to two appeals would exist in every similar case, notwithstanding, as we have repeatedly held, that such was not the intention of the act."

In Carolina Glass Co. v. South Carolina, 240 U. S. 305, 318, the court cited and approved the ruling in the case in 189 U. S., saying: "There is no allegation of diverse citizenship, and the trial court's jurisdiction was invoked solely upon the ground that the controversy involved the application of the Federal Constitution. In such circumstances the Circuit Court of Appeals is without jurisdiction to review."

A supplemental and ancillary bill is a continuation of, and, as to the *source* of Federal jurisdiction,

is referable to the jurisdiction of the court in the main case.

In Carey v. Houston and Texas Railway Co., 161 U. S. 129, it was held that as the jurisdiction of the Circuit Court was invoked in the original proceeding on the ground of diverse citizenship, an ancillary bill before the court must be treated as a continuation of the original proceeding and governed by the same rule as to the right of appeal, and the court, therefore, held in that case that inasmuch as the decree of the Circuit Court of Appeals was made final by the statute no appeal would lie in the ancillary proceeding.

The court at page 129 say:

> "Decrees upon controversies separable from the main suit may indeed be separately reviewed, but the jurisdiction of the Circuit Court over such controversies is not, therefore, to be ascribed to grounds independent of jurisdiction in the main suit."

In Rouse v. Hornsby, 161 U. S. 588, 591, the court say:

> "The jurisdiction of the Circuit Court over the petition was clearly referable to its jurisdiction of the equity suit, which depended wholly upon diverse citizenship, and the case comes directly within recent decisions of this court holding that under such circumstances the decrees and judgments of the Circuit Courts of Appeals are made final by section 6 of the Judiciary Act of March 3, 1891."

In Pope v. Louisville, New Albany Ry., 173 U. S. 573, 77, the court say:

> "And we have repeatedly held that jurisdiction of these subordinate actions or suits is to be attributed to the jurisdiction on which the main suit rested; and hence that where jurisdiction of the main suit is predicated on diversity of citizenship and the decree therein is, therefore, made final in the Circuit Court of Appeals, the judgments and decrees in the ancillary litigation are also final."

In Gableman v. Peoria Ry. Co., 179 U. S. 337, 342, the court say:

> "We have repeatedly held that the jurisdiction of such proceedings is dependent upon that of the main case."

Respectfully,

J. M. MOORE,
Attorney.

EDW. J. WHITE,
Of Counsel.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* McKNIGHT ET AL., RAILROAD COMMISSIONERS OF THE STATE OF ARKANSAS, ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 183. Argued May 2, 1917.—Decided June 4, 1917.

Where a carrier, by reason of temporary and permanent injunctions against state officials and shippers and travellers as a class, collects rates in excess of those fixed by law, the right of a person, who did not appear, to sue for the excess paid by him during the restraint revives when the final decree is reversed by this court and its mandate is issued to dismiss the bill.

Viewed from the standpoint of equitable jurisdiction, a class bill to restrain all such persons from suing to recover their overpayments is not maintainable as a bill to prevent multiplicity of suits, in the absence of any controverted question of fact or law common to their claims.

In a suit to test the validity of rates fixed by the State of Arkansas, the District Court, by injunction *pendente lite* and later by final decree, enjoined the enforcement of the rates, and prohibited shippers and travellers generally from suing the carrier for its failure to keep them in effect. The decree having been reversed by this court and mandate issued with directions to dismiss the bill, *Allen* v. *St. Louis, Iron Mountain & Southern Ry. Co.*, 230 U. S. 553, *Held*, that thereafter the District Court was without power to inquire into and assess the damages sustained by shippers or travellers by reason of the temporary and permanent injunctions, for the purpose of fixing liability on the temporary injunction bonds, at least as to persons who did not elect to appear and make claim; and that, therefore, a reference to that end could afford no basis for an ancillary suit to enjoin such persons from suing in the state court (after the dismissal of the original bill) to recover excess rates collected by the carrier under the temporary and permanent injunctions.

Rule 15 of the District Court for the Eastern District of Arkansas, quoted in a footnote to the opinion, *infra*, 373, relates merely to damages recoverable on bonds accompanying restraining orders or temporary injunctions.

Damages arising from the restraints of a permanent injunction, afterwards reversed, are not recoverable on temporary injunction bonds (*Houghton* v. *Meyer*, 208 U. S. 149), particularly where the decree of permanent injunction expressly released further liability on the bonds.

220 Fed. Rep. 876, affirmed.

THE case is stated in the opinion.

Mr. John M. Moore, with whom *Mr. Edw. J. White* was on the briefs, for appellant.

Mr. Allyn Smith for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

On July 18, 1908, the St. Louis, Iron Mountain & Southern Railway Company filed in the Western Division of the Circuit (now District) Court of the United States for the Eastern District of Arkansas a bill against the Railroad Commissioners of that State to enjoin the enforcement of intrastate freight and passenger rates promulgated by them. Two private citizens, Leigh and McLean, who were alleged to be shippers and travellers on the railroad, were joined as defendants; and the bill prayed that they "and all other persons belonging to the same class, including all patrons" of the railroad, be enjoined from instituting any suits for penalties or double damages under the Arkansas statutes. On September 3, 1908, a temporary restraining order was granted which, besides enjoining the Railroad Commissioners from enforcing rates promulgated by them, ordered that the two private citizens "and all other persons and each of them from and after the time that they shall have knowledge of this order be enjoined from at any time instituting any such suit or action for or on account of any failure of the complainant to keep

in effect and observe said inhibited rates or for the recovery of damages by reason of such failure, during the time this order shall continue in effect."

The Railway Company then executed, as ordered, a bond with surety to the United States in the penal sum of $200,000 "conditioned that the said complainant shall keep a correct account, showing, as respects every carriage of passengers or freight, the difference between the tariff actually charged and that which would have been charged had the rate inhibited hereby been applied, showing the particular carriage in question and the stations between which the same occurred, and the name of the person affected as far as may be practicable, which record shall be made and kept subject to the further order of this Court, and further conditioned that if it should eventually be decided that so much of this order as inhibits the enforcement of the existing rates should not have been made, that said complainant, shall, within a reasonable time, to be fixed by the Court, refund in every instance to the party entitled thereto, the excess in charge over what would have been charged had the inhibited rates been applied, together with lawful interest and damages."

On June 23, 1909, an order was made for an additional bond without surety in the sum of $800,000, which provided, among other things, for giving to each passenger or shipper a receipt which would show the amount payable under the enjoined rates.[1]

[1] The condition prescribed was: "that it shall, on and after July 1st, 1909, issue to each person purchasing a ticket or paying cash fare upon the train from one point in the State of Arkansas to another point in the same State, and confined exclusively to intrastate travel, a certificate or coupon showing the amount paid by such passenger for such ticket and the date thereof; and to every shipper or consignee when paying freight on any commodity shipped from one part of the State of Arkansas to another part and which is wholly the subject of intrastate traffic, a receipt or freight bill, showing the amount charged for

On May 11, 1911, a final decree was entered for the Railway Company making permanent the injunction in the terms of the restraining order, and further ordering "that the bond for injunction filed by the complainant here be released and the sureties thereon discharged from liability." The decree was reversed by this court with directions to dismiss the bill without prejudice (*Allen* v. *St. Louis, Iron Mountain & Southern Ry. Co.*, 230 U. S. 553); and upon filing of the mandate in the District Court on July 18, 1913, this was done. But in the decree of dismissal the court "of its own motion, and against the objection of the complainant, refers, under rule 15 of this Court, the matter of damages alleged to have been sustained by the defendants, the Railroad Commission of the State of Arkansas, by reason of the granting of the temporary and permanent injunctions herein, to Jeremiah G. Wallace, Esq., who is hereby appointed a Special Master for the purpose of determining the damages sustained. That in determining these damages, for the recovery of which the said Commissioners are not acting for themselves but for the benefit of all persons, shippers, consignees and passengers, who have sustained any damages by reason of the granting of said injunctions, the Master is hereby authorized, for the purpose of ascertaining these facts, to examine witnesses, administer oaths, and call upon the plaintiff herein for any books or papers, or transcripts thereof, which, in his opinion, are necessary for the purpose of enabling him to determine any facts in issue in connection with any claim filed with him. . . .

"And the Master is further directed to give notice by publication . . . to the effect that all persons having any claims against the complainant by reason of the

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the carriage of such freight, and also endorse on the same bill the amount or rate which would have been charged had the inhibited rate continued in force; which receipt or coupon or freight bill shall be prima facie evidence of the amount paid and the date of payment."

granting of the injunctions herein, shall present the same to him on or before the 1st day of November, 1913, by filing with him the evidence of their claims, or such other proof as they possess."

Thereafter Gallup brought suit in a state court of Arkansas to recover from the Railway Company the difference between the aggregate freight and passenger rates actually collected from him while the injunctions, temporary and permanent, were in force (that is, from September 3, 1908, to July 18, 1913), and the amount which would have been collected if the rates enjoined had been in effect. The Railway Company promptly filed, in the District Court, on leave granted what is called a "supplemental bill of complaint" to restrain Gallup from proceeding in the state court. Metcalf, another shipper, who had not brought suit, but who, it was alleged, was threatening to do so, was also made defendant as representative of the class; and claiming that the facts justified equitable interference on the ground of avoiding multiplicity of suits, an injunction was sought also against him and others similarly situated. The supplemental bill specifically alleged that by virtue of the decree of May 11, 1911, the Railway Company was released from all liability on the bonds or otherwise from any damage accruing from the injunctions.

Gallup and Metcalf each moved to dismiss the bill for want of equity. Gallup also answered, alleging, among other things, that the overcharges sought to be recovered were mainly those arising after the entry of the final decree in the District Court, and also that the aggregate of claims filed with the special master under the decree of July 18, 1913, greatly exceeded $1,000,000, the amount of the bonds. The District Court granted the prayer of the supplemental bill. Upon appeal by Gallup and Metcalf the Circuit Court of Appeals modified the decree "so as to restrain only such actions as are brought on one or

both of the bonds." From the decree as so modified, the Railway Company appealed to this court.

The Railway Company rests its claim to relief upon two grounds:

First: That the District Court assumed by the decree of July 18, 1913, jurisdiction to determine all claims arising out of overcharges, so that the commencement by Gallup of suit in the state court was an interference with its jurisdiction.

Second: That in view of the number and character of the claims of other shippers and travellers, equity should intervene to prevent multiplicity of suits.

It may be doubted whether, in view of the mandate, there was any power in the District Court to order reference to the master to determine the liability on the bonds; but on this question we are not required to express an opinion.[1] For it is clear that even if such power existed it could extend only to such shippers and travellers as elected to file their claims with the master. The order referring the determination of claims for damages to a special master was declared to be "under Rule 15." [2]

[1] In *In re Louisville*, 231 U. S. 639, 645, and *Louisville* v. *Cumberland Telephone & Telegraph Co.*, 231 U. S. 652, where it was held that the District Court had discretion to authorize further proceedings, the mandate ordered that the decree be "reversed with costs, without prejudice," and remanded "for further proceedings not inconsistent with the opinion of this court"; while in the instant case the mandate ordered that the decree be "reversed with costs" and remanded "with directions to dismiss the bill." See also *St. Louis & San Francisco Railroad* v. *Barker*, 210 Fed. Rep. 902; *Ex parte Dubuque & Pacific Railroad*, 1 Wall. 69; *Durant* v. *Essex Co.*, 101 U. S. 555; *Mackall* v. *Richards*, 116 U. S. 45, 47; *In re Washington & Georgetown R. Co.*, 140 U. S. 91, 97; *In re Potts*, 166 U. S. 263; *Evens & Howard Fire Brick Co.* v. *United States*, 236 U. S. 210.

[2] Rule 15 is as follows: "In all cases in which an injunction has been granted, and a bond executed by the complainants, damages sustained by the party enjoined, *in case the injunction is dissolved*, may be assessed in the same proceeding, either by the court or by reference to a master,

That rule relates to damages recoverable on bonds given when a restraining order or temporary injunction is issued. Damages arising between May 11, 1911 (the date of the decree granting the permanent injunction) and July 18, 1913 (the date of the decree on mandate dismissing the bill) were not recoverable on the injunction bond. *Houghton* v. *Meyer*, 208 U. S. 149. If the remedy of shippers and carrier were limited to proceedings on the bond they would be denied all recovery for overcharges after May 11, 1911. Furthermore the decree of May 11, 1911, expressly released the Railway Company and sureties from further liability on the bonds. In so far as the order referred to the master "under Rule 15" the determination also of damages "alleged to have been sustained by reason of the granting" of the permanent injunction, it was clearly erroneous and affords no justification for enjoining suit in a state court to recover for overcharges made after the final decree. It is, indeed, contended by the Railway Company, that the effect of the decree entered by the District Court is to deprive shippers and travellers of all remedy under the bond.[1] But Gallup makes no claim

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and judgment entered in the same action against the sureties on the bond; provided, however, that unless the damages are thus assessed in the cause, or a judgment entered that the party enjoined is entitled to no damages by reason of the improper granting of the injunction, he may proceed on the bond in an action at law without any further order or leave of the court."

[1] The allegations of the supplemental bill are: "Complainant alleges that [by?] the final decree entered in the aforesaid cause on the 11th day of May, 1911, hereinbefore referred to, it was ordered that the bond for injunction filed by the complainant be released and the sureties thereon discharged from further liability, and it is advised and avers that the effect of said order was to relieve complainant of all liability under said bond and preclude any recovery of damages on said bond or by reason of or growing out of the injunctions ordered in the aforesaid cause.

"Complainant avers that upon the rendition of the final decree in said cause perpetuating and making the temporary injunction theretofore granted permanent said bonds ceased, by operation of law, to

under the bond. He sues on causes of action to recover overcharges arising under the Arkansas statutes. His right to sue, suspended by the injunctions improvidently granted, revived as soon as the permanent injunction was dissolved by the decree dismissing the bill. Although the injunctions enjoined all shippers and travellers, and therefore him, from instituting suits on account of alleged overcharges, Gallup did not in fact become a party to the suit in the District Court; and he could not, after the mandate directed dismissal of the bill, be compelled to submit to that court the adjudication of his claim.

The contention of the Railway Company that the "supplemental bill" should be sustained to prevent multiplicity of suits is also unfounded. Unless it is maintainable as an ancillary bill, the federal court was without jurisdiction as there was no diversity of citizenship. But it was not ancillary to any relief properly within the scope of the decree dismissing the original bill. As an independent bill it is also without equity. The only common issue between the Railway Company and the several shippers and travellers, (namely, whether the rates promulgated by the Railroad Commission were confiscatory), had been settled by the decision of this court. In no other respect have shippers and travellers a common interest. The claims of each present a separate controversy unconnected with that of any of the others. This is obviously true as to all issues of fact which will arise in considering their several claims. And the bill contains no allegation or even suggestion that a controverted question of law, common to all the claims, is involved, which will determine their right to recover or even that there is involved a question of law not fundamental in which they have a

have any effect, and complainant is not liable for any damage that may have accrued to any passenger or shipper on its line of railroad after the rendition of the final decree perpetuating and making the temporary injunction permanent."

common interest. It might be a convenience to the Railway Company to have these numerous claims of shippers determined by the master in the District Court; but such a course would certainly involve great inconvenience to many of the shippers. The bill cannot be maintained as one to prevent multiplicity of suits.

Affirmed.